No. 00-1073-CFX

Title: Owasso Independent School District No. I-011, aka Owasso Public Schools, et al., Petitioners
v.
Kristja J. Falvo, Parent and Next Friend of Her Minor Children, Elizabeth Pletan, Philip Pletan and Erica Pletan

Docketed:
January 3, 2001

Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Jan 2 2001	Petition for writ of certiorari filed. (Response due February 2, 2001)
	Feb 1 2001	Brief of respondent Kristja Falvo in opposition filed.
	Feb 1 2001	Brief amicus curiae of Oklahoma Education Association filed.
	Feb 14 2001	DISTRIBUTED for Conference of March 2, 2001
	Mar 5 2001	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Jun 1 2001	Brief amicus curiae of United States filed.
	Jun 5 2001	REDISTRIBUTED for Conference of June 21, 2001
	Jun 25 2001	Petition GRANTED. SET FOR ARGUMENT November 27, 2001. **********
	Jul 31 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 23, 2001.
	Aug 23 2001	Brief amici curiae of National Education Association, et al. filed.
	Aug 23 2001	Joint appendix filed.
	Aug 23 2001	Brief of petitioners Owasso Independent School District No.I-011, et al. filed.
	Aug 23 2001	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
	Aug 23 2001	Brief amici curiae of National School Boards Association, et al. filed.
	Aug 23 2001	Brief amicus curiae of United States filed.
	Aug 28 2001	Brief amicus curiae of Oklahoma Education Association filed.
	Sep 14 2001	Order extending time to file respondents' brief on the merits to and including October 12, 2001.
	Sep 21 2001	LODGING consisting of twenty copies of letters submitted by the Solicitor General.
	Sep 25 2001	CIRCULATED.
	Oct 12 2001	Brief amici curiae of Capitol Resource Institute, et al. filed.
	Oct 12 2001	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
	Oct 12 2001	Brief of respondents Kristja Falvo, et al. filed.
	Oct 12 2001	Brief amici curiae of Council of Counseling Psychology Training Programs, et al. filed.
	Oct 19 2001	LODGING consisting of twenty bound copies of letters submitted by counsel for the respondents and distributed.
	Oct 26 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

2 pp

No. 00-1073-CFX

Entry	Date	Proceedings and Orders
		argument filed.
	Nov 13 2001	Reply brief of petitioners Owasso Independent School District,No.I-011, et al. filed.
	Nov 21 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 27 2001	ARGUED.
	Nov 28 2001	Record filed.

(1)

00-1073

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal;

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN;

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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107 pp

QUESTION PRESENTED

Whether the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g, which requires educational institutions to preserve the confidentiality of "education records," which are defined as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution," § 1232g(a)(4)(A), prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Independent School District No. 11 of Tulsa County, Oklahoma (the "Owasso School District"), Dale Johnson, Superintendent of the Owasso School District, Lynn Johnson, Assistant Superintendent of the Owasso School District, and Rick Thomas, Principal of the Sixth Grade Center at the Owasso School District, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* A-1) is reported at 229 F.3d 956, and includes the order denying rehearing *en banc* and the dissent of four of the ten active judges of the court of appeals from the order denying rehearing *en banc* (App., *infra* D-1). The opinions of the district court denying Respondent's motion for a temporary restraining order (App., *infra* C-1) and granting summary judgment to Petitioners (App., *infra* B-1) are unreported.

JURISDICTION

The court of appeals issued an opinion in this case on July 31, 2000. Petitioners timely filed a petition for rehearing *en banc*. Although the court of appeals declined to grant rehearing, the court vacated its original opinion

and issued a modified opinion on October 4, 2000 (App., *infra* D-2). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves construction and interpretation of the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"). The full text of FERPA is set forth in the appendix (App., *infra* E-1).

STATEMENT OF THE CASE

A. Factual Background

Some teachers in the Owasso School District utilize students to grade homework papers and weekly tests by having the students exchange papers and score one another's work as the teacher goes over the answers aloud in class. The teachers who utilize this grading practice have found it to be educationally beneficial because it allows them to provide students with immediate feedback. Immediate feedback promotes mastery of the course material by providing prompt reinforcement of the correct answers and immediate correction of mistaken answers.[1]

[1] Neither the court of appeals nor the district court found it necessary to identify what percentage of teachers at the Owasso School District utilize this grading practice or in what academic disciplines it is most prevalent. The evidence in the record establishes that *all* of the reasons advanced in support of this procedure relate to its effectiveness as a pedagogical practice, however.

Under Oklahoma law, a teacher may be responsible for teaching up to 140 students a day.[2] It would be virtually impossible for a teacher to grade 140 homework papers or weekly quizzes overnight and have them ready to be returned the following day, and it would be utterly impossible for a teacher to grade that many papers and return them on the same day they are handed in by the students. The district court found that if teachers are not able to have students grade one another's papers, "students will only receive their results after delay," which "may have a detrimental effect upon both teaching and learning" (App., *infra* C-6).

In addition, this grading practice also allows teachers to cover more material and assign significantly more work than would be possible if the teacher had to grade every individual homework paper. The district court found that, without the ability to have students grade each other's papers, "teachers will begin assigning less homework and quizzes," which may also "have a detrimental effect" upon education (App., *infra* C-6).

[2] OKLA. STAT. tit. 70, § 18-113.3 (2000 Supp.) provides in part:

> C. Beginning with the 1996-97 school year and each school year thereafter, no teacher who is counted in class size count for grades seven through twelve shall be responsible for the instruction of more than one hundred forty (140) students on any given six-hour school day.

Teachers prefer not to allow students to grade their own papers because of the temptation this creates for a student to cheat (App., *infra* C-2).

The district court noted that the grading practice at issue in this case is not unique to the Owasso School District and has been employed in schools across the United States for decades (App., *infra* C-6).

Once the correct and incorrect answers on the homework papers have been marked, the papers are returned to their owners. Students may then announce their own scores aloud from their seats or, if they wish to report their scores in private, take their papers to their teacher and disclose their scores in confidence. The graded results from the homework papers and weekly tests may be but are not necessarily recorded in the teachers' grade books for use in calculating the students' final letter grade in the course.

It is undisputed that teachers at the Owasso School District use this grading practice *only* for daily homework assignments and interim tests and do *not* allow students to score each other's nine-weeks tests. It is also undisputed that teachers do *not* disclose the letter grade on a student's report card or the permanent grade placed on the student's transcript to any other students (App., *infra* B-5; C-2).

Respondent Kristja J. Falvo is the mother of three pre-secondary school students who attend schools operated by the Owasso School District. Respondent objected to the teachers in her children's classes allowing students to exchange papers and score each other's work, contending that her children were embarrassed by the practice.

Respondent acknowledged that any student who did not wish to announce aloud the grade marked on his or her paper was permitted the option of taking the paper to the teacher and disclosing his or her grade in confidence. Respondent contended, however, that the practice of exchanging papers for grading purposes was itself humiliating and embarrassing to her children because, even if the grade was not announced aloud, the student who checked her child's paper would nonetheless know the grade on that paper. As the court of appeals noted, Respondent "testified that the calling out of her children's grades did not really matter because the prior act of one student grading another's paper itself constitutes a disclosure" (App., *infra* A-3, n.2).

B. Proceedings Below

Respondent filed suit in the United States District Court for the Northern District of Oklahoma under 42 U.S.C. § 1983 seeking damages, a declaratory judgment, and an injunction prohibiting the Owasso School District from permitting its teachers to allow students to grade each other's papers. Respondent contended that the grading practice at issue violated her children's right of privacy protected by the Fourteenth Amendment to the United States Constitution. Respondent also asserted that the practice violated the Family Education Rights and Privacy Act because, she contended, the graded papers were "education records" that must be kept confidential under FERPA. The statute defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a

student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

Shortly after filing her complaint, Respondent sought a temporary restraining order enjoining the Owasso School District from utilizing the grading practice at issue. After an evidentiary hearing, the United States District Court for the Northern District of Oklahoma entered a written order declining to grant injunctive relief and setting forth the findings of fact and conclusions of law on which its decision was based (App., *infra* C-1).

Respondent then filed a motion for declaratory judgment and partial summary judgment. Petitioners filed a cross-motion for summary judgment agreeing that the case presented no dispute as to any material fact but asserting that Petitioners rather than Respondent were entitled to judgment as a matter of law. With regard to Respondent's FERPA claim, Petitioners relied on a letter issued by the Family Policy Compliance Office ("FPCO") of the United States Department of Education, which is the federal agency charged with enforcing FERPA, that addressed the specific issue raised by this action.[3] In that letter the FPCO concluded that using students to grade a test or homework assignment of another student and

[3] Petitioners submitted to the district court the Declaration of Leroy S. Rooker, made under penalty of perjury pursuant to 28 U.S.C. § 1746, in which Mr. Rooker stated that he is the Director of the Family Policy Compliance Office and has served in that position for eleven (11) years. Mr. Rooker further stated that the current position of the FPCO with regard to the issue of students grading other students' papers is set forth in his letter of July 15, 1993 (App., *infra* F-1).

calling out that grade in class is *not a violation* of FERPA. In expressing that opinion, the FPCO noted that FERPA is not "intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions." The FPCO thus concluded that "a thoughtful, common sense, and flexible approach is necessary in judging the impact of some classroom activities on a student's right to privacy and vice versa." The FPCO stated:

> FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

(App., *infra* F-4 through F-5).

The district court denied Respondent's motion for partial summary judgment and granted summary judgment to Petitioners on both of Respondent's claims. The court rejected Respondent's Fourteenth Amendment right of privacy claim, concluding that "the interim tests and homework assignments . . . are not 'highly personal' matters worthy of constitutional protection" (App., *infra* B-5). With regard to Respondent's FERPA claim, the district court deferred to the FPCO's interpretation of the statute, concluding that such interpretation "is reasonable

and does not conflict with the expressed intent of Congress" (App., *infra* B-4).

Respondent appealed to the United States Court of Appeals for the Tenth Circuit. The court of appeals affirmed the district court's grant of summary judgment to Petitioners on Respondent's Fourteenth Amendment right of privacy claim, reasoning that although "the school work and test grades of pre-secondary school students constitute somewhat personal or intimate information," to conclude that such information is so highly personal as to fall within the zone of constitutional protection "would trivialize the Fourteenth Amendment" (App., *infra* A-8).

The court of appeals reversed the grant of summary judgment on Respondent's FERPA claim, however, ruling that the district court erred in giving deference to the FPCO's interpretation of FERPA. The court ruled that "the meaning of the terms 'education records' and 'maintain' are clear from [FERPA] itself," thus deference to the FPCO was inappropriate because "a court can only defer to an agency's interpretation if a statute is deemed ambiguous" (App., *infra* A-18). The Tenth Circuit found no ambiguity in FERPA that would justify deferring to the FPCO's interpretation of the statute.

The court of appeals also determined that the FPCO's interpretation was not "entitled to respect" under this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because a qualifying statement in the FPCO letter suggested that "the FPCO may not have thoroughly

considered the issue . . . " (App., *infra* A-19).[4] The court further found the FPCO opinion "bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not 'maintained' as required under FERPA" (App., *infra* A-20). Finally, the court found significant the FPCO's use of the language " 'maintained' by an educational agency or institution" rather than the broader language from FERPA that encompasses records "maintained by an educational agency or institution *or by a person acting for such agency or institution*" (App., *infra* A-20; quoting 20 U.S.C. § 1232g(a)(4)(A)(ii) (emphasis added by court)).

The court of appeals concluded that "[b]ased purely on the language of the statute itself, . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA" (App., *infra* A-20 through A-21). The court found that the grading practice violated FERPA irrespective of whether the students announced their grades aloud in class or reported their grades to the teacher in confidence, noting that "the method of reporting the grades is irrelevant to our analysis, because a

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[4] In its July 15, 1993, letter, the FPCO stated:

> Because you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District's participation in the activities would violate rights afforded parents by FERPA. However, below is a general discussion of FERPA as it relates to the types of activities you present.

(App., *infra* A-20; F-3 through F-4).

disclosure occurs at the earlier stage when one student grades the work of another" (App., *infra* A-21, n.10).

The court found no significance in the fact that the teachers have discretion to record or not record the grade for use in calculating the student's final grade in the class, reasoning that because "at least some grades which students give one another and report to the teacher are then recorded in the teacher's grade book," those grades are " 'maintained . . . by a person acting for [an educational] agency or institution' and constitute 'education records' " (App., *infra* A-21). The court also noted in a footnote that "[e]ven if the homework or test grade never figures into the student's final grade, the teacher must still receive the grade to use it for some other purpose, perhaps to preserve, in a gradebook or otherwise, a yardstick of each student's performance and progress to better develop effective teaching strategies" (App., *infra* A-24, n.11).

The court of appeals remanded the case to the district court for further proceedings (App., *infra* A-32).

Petitioners timely filed a petition for rehearing *en banc*. On October 4, 2000, the court issued an order denying Petitioners' request (App., *infra* D-1).

Circuit Judge Kelly filed an opinion dissenting from the denial of rehearing *en banc*, which was joined by Circuit Judges Tacha, Baldock, and Brorby. The dissenting judges observed that the court's decision "[d]efining 'education records' to include 'grades which students record on one another's homework and test papers and then report to the teacher' . . . is a vast expansion of the actual words of the statute, and [is] unsupported by the

legislative history" (App., *infra* D-2 through D-3). The dissenting members of the court concluded that "[a] careful reading of FERPA and its legislative history requires a much narrower definition of 'education records.' " The dissent noted that the majority's interpretation of the term "education records" to include the grades placed on daily homework papers and interim tests "necessarily invokes the right to a hearing to challenge the grade" recorded on that homework paper or interim test under 20 U.S.C. § 1232g(a)(2), and obligates educational institutions "to maintain an access record indicating those who have obtained or requested access to" the grade recorded on that homework paper or interim test under 20 U.S.C. § 1232g(b)(4)(A). The dissent observed that "[g]iven the thousands of grades a student might receive over time, this seems impossible, if not implausible" (App., *infra* D-5).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit has decided an important question of federal law that will have a major impact far beyond the geographical boundaries of the Tenth Circuit. The decision of the court of appeals has created confusion and apprehension among public educators throughout the nation regarding the legality of a common and long-standing educational practice. As no other federal court has addressed whether Congress intended the Family Education Rights and Privacy Act to prohibit this grading practice, the Court should grant certiorari to consider this important question of first impression under federal law. *See American*

Federation of Musicians v. Wittstein, 379 U.S. 171, 175 (1964) (certiorari granted to review question of first impression under Labor-Management Reporting and Disclosure Act of 1959).

Moreover, the Court should grant certiorari because the court of appeals rejected the long-standing interpretation of the Family Policy Compliance Office of the Department of Education regarding the scope of the term "education records" under FERPA. School districts, boards of education, and individual teachers, administrators and board members throughout the nation now risk litigation and liability – *including individual liability* – if they continue the practice long authorized by the FPCO of allowing pre-secondary school students to exchange and grade each other's homework papers, quizzes, and tests. Because the court of appeals held that the FPCO's interpretation was not only entitled to no deference but also carried only "minimal persuasive power" (App., *infra* A-19), public educators in every school district in the country must now question whether they may safely rely on the FPCO's well-established interpretation as to the scope of "education records" under FERPA. *See Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974) (certiorari granted because decision of court of appeals was asserted to be inconsistent with the long-established policy of the Secretary of the Interior and the Bureau of Indian Affairs).

Finally, the decision of the Tenth Circuit is erroneous and represents "a vast expansion of the actual words" of FERPA that is plainly inconsistent with the intent of Congress in enacting the statute, as was recognized by the four judges who dissented from the denial of rehearing *en banc* (App., *infra* D-2 through D-3). The question

presented is important to the educators and students of our nation's public schools. For these reasons, the Court should review the decision of the court of appeals.

I. The Court of Appeals Has Decided an Important Question of Federal Law that Will Have a Significant Impact on the Day-to-Day Operations of Our Nation's Public Schools

The preeminence of public education in the hierarchy of our nation's values cannot be disputed. Almost 50 years ago, this Court recognized that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954). Even prior to *Brown*, however, this Court had emphasized that "[t]he American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). In *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972), this Court noted that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system. . . ." And in *Plyler v. Doe*, 457 U.S. 202, 221 (1982), this Court observed, "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society." Because of the importance of education in our society, this Court should be extremely cautious of allowing the decision of a lower federal court that threatens to disrupt the daily operations of our nation's classrooms to go unreviewed.

The decision of the court of appeals will play havoc with even the most routine daily tasks in the education of our nation's children. The court's decision means that teachers may no longer ask one or more students to walk about the classroom returning homework papers, quizzes, or tests that have been corrected and/or graded by the teacher to their classmates, because the student(s) selected to pass out the corrected or graded work would have the opportunity to see the scores or grades thereon. Teachers who choose to allow students to grade their own work in class, but who then take up the papers to make random checks for cheating, will not be able to ask one or more students to collect the scored papers. Nor will teachers be able to collect corrected or graded work by asking students to pass their papers to the front of the class. Likewise, teachers may no longer utilize student aides to assist them in grading papers and recording grades. Under the Tenth Circuit's reasoning, all of these practices violate FERPA because one or more students would be permitted to see the score or grade recorded on another student's paper.[5] As the four dissenting judges noted:

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[5] In response to the petition for rehearing *en banc* filed by Petitioners, the court of appeals modified its opinion to address some of the concerns raised by Petitioners. The court noted that teachers may avoid liability under FERPA by "collecting and passing out papers themselves or placing graded papers in sealed envelopes." The court was untroubled by the practical difficulties its decision imposes on public educators, blithely explaining that

> if a teacher would like one student to collect from the others self-graded papers, the teacher can simply direct the students to turn their papers over so the grade is not revealed. Similarly, if a teacher does not wish to personally hand out graded papers, the teacher may have the students come to retrieve the papers one at a time, so they do not see each others' grades; alternatively, the teacher could fold over the papers to conceal the students' grades but not their names and thus allow a student to hand back the papers.

(App., *infra* A-28 through A-29, n.13). Petitioners respectfully submit that a teacher's choice to allow students to collect or pass out graded papers with no precautions to preserve the confidentiality of the grades recorded on those papers beyond admonishing the students to "turn their papers over" or "fold[ing] over the papers to conceal the students' grades" would likely expose that teacher to personal liability should one of his or her students bring a *Falvo*-type action against the teacher under 42 U.S.C. § 1983.

> Practical difficulties with the court's decision abound because care must be taken to insure that no student learns the grade of another. . . . A routine function – passing out a stack of graded papers alphabetized by name – will now require teacher involvement and the students cannot do it themselves for fear that one student might see another's grade, intentionally or unintentionally. This cannot be what Congress meant when it sought to protect a student's personal information and permanent academic record from unwarranted disclosure. Our teachers are overworked and underpaid now. What will happen to them when they can be sued by every irate parent or student claiming that someone saw a grade or that they were denied a fair hearing to challenge a test grade?

(App., *infra* D-5 through D-6).

The court of appeals suggested that school districts need not forego any of the benefits of having students grade each other's papers because FERPA "does not prohibit students from correcting papers if done anonymously or with the consent of parents" (App., *infra* A-28, n.13). But as educational experts who have analyzed the court's opinion have already noted, the court's proposed solutions are much more problematical than they may at first appear. Writing in the November issue of *Phi Delta Kappan* magazine, Professor Perry A. Zirkel, Iacocca Professor of Education at Lehigh University, observed:

> The court's express exceptions for anonymous, i.e., effectively coded, papers and for parental consent present cumbersome practical challenges. Social security numbers or simple personal ID numbers are not likely to be unidentifiable to other students. Similarly, the cost of obtaining informed consent from parents for students under age 18 may outweigh the benefits of the practice.

Zirkel, *A D-Grading Experience?*, PHI DELTA KAPPAN, November 2000, at 253.

As Professor Zirkel's comment illustrates, teachers who wish to use coded papers will not be able to use the student's social security number or student ID number because of the high probability that some classmates will already be familiar with those numbers. Instead, each teacher will have to come up with his or her own unique "code" and advise each of his or her students – in confidence – of that student's assigned code number. Even

with these precautions, there is no assurance that students will not deliberately or inadvertently reveal their individual code numbers to their classmates.

Nor is parental consent an effective alternative. At the very least, obtaining signed consent forms from every parent will be an additional administrative burden on each teacher who wishes to continue utilizing students to grade papers. Moreover, it is highly unlikely that teachers will obtain signed parental consent forms from every parent. A few parents, like Respondent, will undoubtedly choose not to allow their children to exchange papers with other students. Far more will simply not understand the request or will ignore the consent form. Some consent forms will undoubtedly be lost in the process of being transported from school to home and back. Teachers will thus have to choose between foregoing an effective educational practice if fewer than 100% of that teacher's students return signed consent forms or giving the appearance of allowing "special treatment" to a few students by allowing them to grade their own papers while everyone else in class must exchange papers. Neither scenario is a prescription for an efficient educational atmosphere in the classroom.

Finally, the court's decision implicates educational practices far more significant than the daily collection or passing out of graded papers. Selection of students for academic achievement awards, publication of the names of students earning honor roll recognition, and determination of the eligibility of student-athletes for extracurricular athletics under "no pass, no play" rules will all be

affected by the decision of the court of appeals.[6] The court's decision also calls into question the legality under FERPA of the practice common not only in public schools but also in our nation's institutions of higher learning of basing a portion of a student's grade in a course on the student's participation in class. If a student never participates in in-class discussions, surely his classmates will be aware that such student will receive only minimal credit or no credit at all for that portion of his final grade in the class.

As Professor Zirkel summarized:

> By implication, the 10th Circuit's decision also calls into question various other practices in basic or, in some cases, higher education, such as 1) the enlistment of the proverbial "teacher's pet" to help score, during free periods or after school, other students' papers; 2) the awarding of a group grade and other such practices related to cooperative or small-group learning; 3) in-class announcing of students' grades; 4) displaying student papers that have earned top grades; 5) publishing the names of students on the honor roll; 6) posting lists of students' grades by name or reasonably identifiable code; and even 7) sharing individual athletic results with the media. . . .

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[6] As the four judges who dissented from the order denying rehearing *en banc* pointed out: "A school district should be wary of academic awards based upon grades, for the underlying grades may be revealed. Likewise, a determination that a student athlete is academically ineligible carries the same risk" (App., *infra* D-5 through D-6).

Zirkel, *A D-Grading Experience?*, PHI DELTA KAPPAN, November 2000, at 253.

The opinion of the United States Court of Appeals for the Tenth Circuit in this case is of substantial concern to school districts, school officials, and teachers across America. Therefore, this Court should grant certiorari and review the lower court's decision.

II. The Court of Appeals Expressly Rejected the Long-Standing Interpretation of FERPA Followed by the Family Policy Compliance Office of the Department of Education, Thereby Creating Doubt Among This Nation's Public Educators Regarding Continued Reliance on the FPCO's Analysis

In its opinion, the court of appeals *expressly* rejected the long-standing interpretation of the Family Policy Compliance Office of the United States Department of Education. The court concluded that the FPCO's interpretation was not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because "the meaning of the terms 'education records' and 'maintain' are clear from the statute itself" (App., *infra* A-18). The court further determined that the FPCO's analysis was not "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because it "lack[ed] sufficient reasoning, fail[ed] to account for the breadth of FERPA's language, and indicate[d] . . . [a] somewhat cursory and purely hypothetical consideration of the issue before the court . . . " (App., *infra* A-20).

The court of appeals' assertion that there is no "ambiguity" regarding the meaning of "education records" under FERPA is refuted by the divided opinions of the

active judges of the Tenth Circuit regarding Petitioners' request for rehearing *en banc*. More important, it is refuted by the text of FERPA itself.

In enacting FERPA, Congress not only defined what is included in the term "education records"[7] but also *excluded* from that definition any "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. § 1232g(a)(4)(B)(i). The clear import of this language is to exclude from the *definition* of education records the type of routine grades and scores received by teachers and recorded in their gradebooks. Yet the court of appeals read this portion of the statute as if it provided that granting "substitutes" access to education records was an *exception* under 20 U.S.C. § 1232g(b)(1), which is the portion of the statute that specifies persons who may be allowed access to education records without violating FERPA (App., *infra* E-6).

The lower court's analysis ignores the salient fact that § 1232g(b)(1)(A) *already* provides that it is not a violation of FERPA to allow access to education records by "other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to

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[7] FERPA defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

have legitimate educational interests. . . . " Because allowing a substitute teacher access to education records is already permitted by § 1232g(b)(1)(A), the court's construction of the words "and which are not accessible or revealed to any other person except a substitute" as merely permitting a teacher to disclose his or her grade book to a substitute is illogical.[8]

At the very least, § 1232g(a)(4)(B)(i) creates an ambiguity as to whether routine grades recorded in a teacher's gradebook fall under the definition of "education records" or are excluded from that definition.

The court of appeals' reasoning for not giving due respect to the FPCO's interpretation has even more serious flaws. The court criticized the FPCO for reliance on insufficient reasoning, failure to consider the breadth

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[8] In response to the Petitioners' petition for rehearing, the court of appeals amended its opinion to explain further its reasoning on this point (App., *infra* A-23). The court of appeals stressed that its interpretation of § 1232g(a)(4)(B)(i) is "the only reasonable way to construe that provision" because its interpretation allows a teacher to show his or her gradebook to a substitute *"without having to also show it to a parent"* (App., *infra* A-24; emphasis original).

The Petitioners submit that this makes sense *only* if § 1232g(b)(1)(A), which allows the disclosure of education records to "other school officials, including teachers," is somehow construed as *not* allowing "substitute teachers" to have access to education records. Such a reading is plainly unsupportable. The better interpretation of § 1232g(a)(4)(B)(i) is that it does not purport to specify who may or may not have access to a student's "education record," but simply defines the type of document *excluded* from the definition of "education record," *e.g.*, a teacher's gradebook.

of FERPA's language, and a "cursory" and "purely hypothetical" consideration of the question presented (App., *infra* A-20). Yet, as the four dissenting judges noted, the court's analysis of "education records" "necessarily invokes the right to a hearing to challenge the grade" recorded on a homework paper, quiz, or test under 20 U.S.C. § 1232g(a)(2), and obligates educational institutions "to maintain an access record indicating those who have obtained or requested access to" the grade recorded on that homework paper or interim test under 20 U.S.C. § 1232g(b)(4)(A) (App., *infra* D-4 through D-5). As the discussion at pp., *infra* 23-28, establishes, the court of appeals plainly departed from Congress' intent.

Regardless of the merits of the court of appeals' analysis, however, the court's rejection of the FPCO's long-standing interpretation of FERPA creates doubt and uncertainty about the continued viability of the FPCO's analysis. This uncertainty regarding the status of the law – and the propriety of continuing to rely on the FPCO's assurances that FERPA does not prohibit teachers from allowing students to grade each other's papers – will adversely affect the education of our nation's youth. When confronted with the question of whether to continue to follow the position espoused by the FPCO or adopt the view promulgated by the Tenth Circuit, many litigation-averse school districts across the nation will undoubtedly choose to follow the path least likely to embroil them in costly lawsuits. Although school officials can hardly be criticized for electing to protect the public purse, such educators should not be compelled to choose between facing vexatious litigation or foregoing beneficial educational practices. Because the decision of the

court of appeals has engendered nation-wide uncertainty regarding the FPCO's interpretation of FERPA, this Court should grant certiorari and review the decision of the court of appeals.

III. The Decision of the Court of Appeals Is Erroneous and Is Clearly Contrary to the Intent of Congress in Enacting FERPA

In enacting FERPA, Congress provided parents the right to a hearing to challenge the content of a student's "education records." 20 U.S.C. § 1232g(a)(2).[9] The legislative history of this provision makes clear that although Congress did not intend to require an educational agency to hold a hearing to challenge a teacher's assessment of the quality of a student's work, a hearing is required to

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[9] That portion of FERPA provides:

> (2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided *an opportunity for a hearing by such agency or institution,* in accordance with the regulations of the Secretary, *to challenge the content of such student's education records,* in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, *and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.*

20 U.S.C. § 1232g(a)(2) (emphasis added).

allow the parents to seek to correct any *ministerial error* in the student's "education records":

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given in the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of *institutional records* which record the grade which was actually given. Thus, the parents of a student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to law contest whether the teacher should have assigned a higher grade because the parents or students believe that the student was entitled to the higher grade.

120 CONG. REC. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment) (emphasis added).

The foregoing legislative history leaves no doubt that Congress intended the hearing right granted by § 1232g(a)(2) of FERPA to apply only to allow a parent or student to challenge "the grade given in the student's performance in a course" and maintained in the education agency's "institutional records." Yet according to the court of appeals, the public schools of this country must grant a hearing to every parent seeking to challenge the correctness of any score recorded by his or her child on any specific homework paper, quiz, or test by such child, because the score of each such homework paper, quiz, or test is an "education record" entitled to the full panoply

of protections secured by FERPA. Surely it cannot be suggested that Congress intended that result.[10]

The dissenting judges also referred to 20 U.S.C. § 1232g(b)(4)(A),[11] which requires the "school official and

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[10] In its modified opinion, the court of appeals asserted that "Congress could have sensibly intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers" (App., *infra* A-26). Yet the hypothetical situation constructed by the court to justify this result involved a situation in which the incorrect grading "significantly impact[ed]" the student's permanent grade. Thus, the court refuted its own point. Petitioner agrees that the scenario described by the court, in which a semester-long series of incorrect grades accumulates and negatively impacts the student's final grade, would be subject to a curative hearing under FERPA. Unlike the court of appeals, however, Petitioners would *not* require educational institutions to schedule a hearing to mollify parents who believe their child was erroneously credited with 8 points instead of 9 on a 10 point quiz or homework assignment. It simply cannot be suggested that Congress could have "sensibly intended" to allow parents a hearing to challenge the correctness of the score recorded on each and every test, quiz, and homework assignment completed by their child, regardless of the ultimate impact of that particular score on the student's final grade.

[11] That portion of FERPA provides:

> (4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. *Such record of access shall be available only to parents, to the*

his assistants who are responsible for the custody of such records" to maintain a separate record of "all individuals . . . agencies, or organizations which have requested or obtained access to a student's education records."

Read consistently with the decision of the court of appeals, § 1232g(b)(4)(A) would require every teacher to keep a *separate record* for each of his or her students to indicate all individuals, agencies, or organizations "which have requested or obtained access" to that student's scored homework or in-class assignments and identifying "the legitimate interest that each such person, agency, or organization has in obtaining this information." It can hardly be suggested that Congress intended to task every public school teacher in the nation with the responsibility of maintaining an entirely new set of records to reflect requests for access to a student's course work and the "legitimate interest" of each person or entity requesting such access.

Moreover, FERPA unambiguously requires that this record of access be kept not only to identify the persons or entities that were allowed access to a student's homework papers on in-class work but also every person or entity that *requests* such access. Congress certainly must

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school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 U.S.C. § 1232g(b)(4)(A) (emphasis added).

have known that this potentially could be a very burdensome requirement.[12]

Most telling, however, is the fact that in § 1232g(b)(4)(A), Congress expressly called for a single school official (and his assistants) to be "responsible for the custody" of education records. Clearly, this language reflects a Congressional intent that there be a *central custodian* of education records at each educational agency.

By acknowledging that one official is to be "responsible for the custody" of education records under § 1232g(b)(4)(A), Congress clearly intended to limit "education records" to the institutional records that an educational agency permanently maintains. Under this construction of FERPA, the official "responsible" for these education records is clearly the educational agency's registrar.

Thus, Congress' use of the word "maintained" in the definition of "education record" clearly means "maintained" in an educational agency's *permanent, institutional records*, and not "maintained" in the sense of recorded on a student's paper "to allow the teacher to use the grade in some fashion," as the court of appeals concluded (App., *infra* A-24).

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[12] The court of appeals responded to this point in its modified opinion by suggesting that nothing in its opinion "would prohibit a central custodian from maintaining the access records" (App., *infra* A-28). Petitioners submit that it is highly implausible, to say the least, to read FERPA as making each classroom teacher a custodian of "education records," yet delegating to a "central custodian" the task of keeping – not the "education records" themselves – but the records of requests for access to the education records.

This interpretation of FERPA is perfectly consistent with the practices of educational agencies across America, with which Congress must be presumed to have been familiar. An educational agency's registrar is commonly "responsible for custody" of the permanent, institutional records of that educational agency, and the registrar often has assistants who share the responsibility for these duties.

Thus, the express language of § 1232g(b)(4)(A) indicates that Congress intended that FERPA apply only to the permanent, institutional records maintained by an educational agency, and not to the homework, quizzes, and tests evaluated by a teacher in the daily performance of his or her teaching duties. Because the court of appeals' interpretation of this important federal statute is wholly at odds with the plainly expressed intent of Congress, this Court should grant certiorari and review the decision of the lower court.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

KRISTJA J. FALVO, as parent and next friend of her minor children, Elizabeth Pletan, Philip Pletan and Erica Pletan; and on behalf of others similarly situated,

Plaintiff-Appellant,

v.

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a, Owasso Public Schools; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; JOHN DOE, sued as: Does 1 through 50,

Defendants-Appellees.

No. 99-5130
(Filed Oct. 4, 2000)

Appeal from the United States District Court
for the N. District of Oklahoma
(D.C. No. 98-CV-765-K)

Wilfred K. Wright, Jr., of Tulsa, Oklahoma, for Appellant.

Karen L. Long, of Rosenstein, Fist & Ringold, Tulsa, Oklahoma, (Jerry A. Richardson with her on the brief), for Appellees.

Before **LUCERO, McKAY,** and **MURPHY,** Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

In the instant case, this court must decide whether a practice employed by pre-secondary school[1] teachers in the Owasso Independent School District (the "School District") of allowing their students both to grade one another's tests and other work and to call out their own grades in class (the "grading practice") violates either the Fourteenth Amendment to the United States Constitution or the Family Education Rights and Privacy Act ("FERPA"). Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that although the Fourteenth Amendment does not preclude the grading practice, FERPA does. The individual defendants, however, are entitled to qualified immunity because it was not clearly

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[1] The record indicates that the plaintiff students were in the sixth through eighth grades during the relevant time period and that this school district has a different school for each of these grades. We thus employ the term "pre-secondary school" to encompass the institutions attended by all three children.

established law that the grading practice violated FERPA. This court therefore **affirms** the district court's grant of summary judgment in favor of all defendants on the constitutional claim and **reverses** the grant of summary judgment in favor of the School District on the FERPA claim. Also as to the FERPA claim, we **affirm** the grant of summary judgment in favor of the individual defendants on the plaintiff's claim for monetary relief, but **reverse** the judgment on the plaintiff's claim for injunctive relief.

II. BACKGROUND

Kristja J. Falvo is the mother of Elizabeth, Philip, and Erica Pletan, who all attended school in the School District. Falvo learned that a number of her children's teachers would sometimes have their students grade one another's work assignments and tests and then would have the students call out their own grades to the teacher. During the 1997-98 and 1998-99 school years, Falvo complained about this grading practice to school counselors and to the School District superintendent, claiming it severely embarrassed her children by allowing other students to learn their grades. Although Falvo was told that her children always had the option of confidentially reporting their grades to the teacher,[2]

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[2] Falvo has not asserted that the distinct practice of calling out grades in class constitutes a violation of the Constitution and FERPA, independent of the process of having children exchange papers for grading. In fact, she testified that the calling out of her children's grades did not really matter because the prior act of one student grading another's paper itself constitutes a disclosure. As a consequence, this court need not determine whether the challenge to the practice of calling out

the School District refused to disallow the grading practice.

In October 1998, when Falvo's children were in the sixth, seventh, and eighth grades, she brought a class action lawsuit pursuant to 42 U.S.C. § 1983 against the School District, Superintendent Dale Johnson, Assistant Superintendent Lynn Johnson, and Principal Rick Thomas (the "individual defendants"), alleging the grading practice violated Fourteenth Amendment privacy rights and FERPA. Before the district court resolved whether to certify the class, Falvo moved for declaratory and summary judgment on her two claims. The School District filed a cross-motion for summary judgment on both claims. The district court applied the test articulated in *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) and concluded the grading practice did not implicate a constitutionally-protected privacy interest. Additionally, the district court ruled that the grades subject to the grading practice do not constitute "education records" under FERPA. Thus, the district court granted summary judgment in favor of all defendants on both claims.

Falvo then moved for reconsideration and clarification of the district court's judgment, arguing the court should have granted relief in favor of Philip Pletan on the Fourteenth Amendment claim because, as a special education student, he had a legitimate expectation of privacy in his grades under the Individuals with Disabilities Education Act ("IDEA"). The district court

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grades in class is resolved by the option which the School District provided Falvo's children to privately report their own grades to the teacher.

denied that motion, concluding that because Falvo did not make a distinct claim under IDEA, she could not premise a Fourteenth Amendment claim on that statute.

On appeal, Falvo asserts the district court erroneously granted summary judgment in favor of the defendants, because the grading practice violates both the Fourteenth Amendment and FERPA.

III. DISCUSSION

A. Standard of Review

This court conducts a *de novo* review of a district court's summary judgment decision. *See Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1097 (10th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, this court views the evidence and draws reasonable inferences therefrom in a light most favorable to the party opposing summary judgment. *See Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 450 (10th Cir. 1996). Although the instant case involves cross-motions for summary judgment, this court nonetheless views the evidence in a manner most favorable to Falvo, because she is the party challenging the district court's grant of summary judgment.

B. The Fourteenth Amendment Claim

Falvo contends the right to privacy under the Fourteenth Amendment prohibits public disclosure of students' grades. She thus argues the district court erred in dismissing her Fourteenth Amendment claim because the grading practice employed by her children's teachers impermissibly infringes upon that constitutional privacy right. Although this court acknowledges the existence of a Fourteenth Amendment right to prevent disclosure of certain types of personal information, the school work and test grades of pre-secondary school students do not rise to the level of this constitutionally-protected category of information.

In relevant part, the Fourteenth Amendment states, "nor shall any State deprive any person of . . . liberty . . . without due process of law." U.S. Const. Amend. XIV, § 1. In *Roe v. Wade*, the Supreme Court announced that a constitutional "right of privacy . . . [is] founded in the Fourteenth Amendment's concept of personal liberty." 410 U.S. 113, 153 (1973). Subsequently, the Court noted that one type of constitutionally-protected privacy right "is the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *see also Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977).

In assessing whether a specific category of information is constitutionally protected, this court "must consider, (1) if the party asserting the right has a legitimate expectation of privacy [in that information], (2) if disclosure serves a compelling state interest, and (3) if

disclosure can be made in the least intrusive manner."[3] *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981); *see also Flanagan*, 890 F.2d at 1570. Although this test's formulation seems to indicate this court must consider all three factors, the actual application of the test in prior cases demonstrates that we need not address the second and third factors if the first is not met. *See Nilson v. Layton City*, 45 F.3d 369, 371 (10th Cir. 1995) ("Because the alleged unconstitutional conduct in this case fails to meet the first prong of this test, we hold that Mr. Nilson has no constitutional privacy in his expunged criminal record."); *Flanagan*, 890 F.2d at 1571

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[3] This test differs significantly from the analysis employed to determine the constitutionality of governmental infringement of other types of liberty interests. In these other contexts, a court first ascertains whether a liberty interest exists. *See, e.g., Seamons v. Snow*, 84 F.3d 1226, 1234-35 (10th Cir. 1996). Similarly here, this court must first determine whether the claimant possessed a form of liberty interest, a legitimate expectation of privacy in the information sought to be protected. *See Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981). The tests, however, diverge at this point. In the usual Fourteenth Amendment liberty analysis, a court, having resolved that a liberty interest exists, then determines the degree of importance of that liberty interest in order to decide which level of analytical scrutiny to apply. *See, e.g., United States v. Deters*, 143 F.3d 577, 583 (10th Cir. 1998). Under the test articulated in *Lichtenstein*, once a legitimate expectation of privacy is established, the court must automatically subject the governmental deprivation to strict scrutiny without ever determining whether the expectation of privacy constitutes a fundamental right. *See Lichtenstein*, 660 F.2d at 435; *see also infra* note 4 (noting a further distinction between this court's jurisprudence regarding the constitutional right to have personal information protected and other types of Fourteenth Amendment liberty interests).

("Since we hold that the information released by Chief Munger is not of a highly personal nature, we deny the plaintiffs' privacy claim."). In other words, if Falvo and her children do not have a legitimate expectation of privacy in the children's school work and test grades, they have no Fourteenth Amendment privacy right protecting those grades from disclosure.

A party's expectation in the privacy of specific information is sufficiently legitimate to warrant constitutional protection only if that information "is highly personal or intimate." *Nilson*, 45 F.3d at 372. Although this court acknowledges that the school work and test grades of pre-secondary school students constitute somewhat personal or intimate information, we cannot conclude that these grades are so highly personal or intimate that they fall within the zone of constitutional protection; to hold otherwise would trivialize the Fourteenth Amendment. *Accord Alexander v. Peffer*, 993 F.2d 1348, 1350-51 (8th Cir. 1993); *Davis v. Bucher*, 853 F.2d 718, 721 (9th Cir. 1988); *see generally Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that even the Supreme Court "must . . . exercise the utmost care" when asked to announce a new substantive due process right (quotation omitted)).

Falvo contends that she and her children have a legitimate expectation of privacy in these grades because two federal statutes, FERPA and IDEA, provide just such an expectation. This court has recognized that "[t]he presence of privacy statutes and regulations may inform our judgment concerning the scope of the constitutional right to privacy." *Flanagan*, 890 F.2d at 1571. In several prior public disclosure cases, however, this court has

refused to premise a constitutional privacy right merely on the existence of state privacy statutes. *See id*; *Nilson*, 45 F.3d at 372; *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986). In one such case, this court explained, "Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution. . . . Any disclosed information must itself warrant protection under constitutional standards." *Mangels*, 890 F.2d at 839. This court therefore must similarly conclude that federal privacy statutes standing alone cannot be the basis for a Fourteenth Amendment right to prohibit disclosure of personal information.[4] Thus, contrary to Falvo's contention, neither FERPA nor IDEA can create a Fourteenth Amendment privacy right; rather, the grades themselves must warrant constitutional protection.

Although this court's conclusion, discussed *infra*, that FERPA prohibits revelation of students' school work and test grades informs our judgment about the scope of the constitutional right to prevent disclosure of personal information, we cannot say the right to prevent disclosure of pre-secondary school work and test grades

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[4] We acknowledge the possible inconsistency between such precedent and both the legitimate expectation of privacy test itself and other Tenth Circuit case law which holds that constitutionally-protected liberty interests can spring from statutes. *See, e.g., Wildermuth v. Furlong*, 147 F.3d 1234, 1237 (10th Cir. 1998). Nonetheless, this court is bound by this Circuit's controlling authority in this particular area of Fourteenth Amendment jurisprudence. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

is a "deeply rooted notion[ ] of fundamental personal interest[ ] derived from the Constitution."[5] *Mangels*, 890 F.2d at 839. Falvo and her children therefore lack a sufficiently legitimate expectation of privacy in those grades to claim a constitutional right in their protection. This court thus concludes the district court properly granted summary judgment in favor of the defendants on Falvo's Fourteenth Amendment claim.

C. FERPA Claim

1. Jurisdiction

Although most courts have concluded that a violation of FERPA may be the basis for a civil rights lawsuit under 42 U.S.C. § 1983, the parties have not raised that issue in the instant case. *See Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp.2d 664, 672-74 (D. Minn. 1999); *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1107 (D.S.D. 1995); *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 47-48 (D.N.H. 1994); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991). *But see Gundlach v. Reinstein*, 924 F. Supp. 684,

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[5] This court need not resolve whether IDEA similarly prohibits the grading practice, because even if the grading practice does violate that statute, we still could not conclude that the right to prevent disclosure of these grades is a "deeply rooted notion[ ] of fundamental personal interest[ ] derived from the Constitution." *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986).

692 (E.D. Pa. 1996); *Norris v. Board of Educ. of Greenwood Community Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992). Whether the alleged violation of FERPA is actionable under 42 U.S.C. § 1983, however, may implicate this court's and the district court's subject matter jurisdiction over Falvo's FERPA claim. *See Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.*, 199 F.3d 1123, 1126 (10th Cir. 1999) ("Federal question jurisdiction exists when a cause of action 'aris[es] under the Constitution, laws, or treaties of the United States.' " (quoting 28 U.S.C. § 1331)), *cert. denied*, 120 S. Ct. 2014 (2000); *see also Ackerley Communications of Fla., Inc. v. Henderson*, 881 F.2d 990, 993 (11th Cir. 1989) (dismissing for lack of subject matter jurisdiction a claim premised on the violation of a federal statute because § 1983 does not provide a remedy for a violation of that particular statute); *Belanger*, 856 F. Supp. at 42 ("Before addressing the question of whether the requested records are 'education records' as defined by FERPA . . . , the court *must determine* whether the plaintiff has a cause of action under § 1983 for the alleged violation of [this] statute[ ]." (emphasis added)). Because the issue was not raised by the parties, this court does not decide if subject matter jurisdiction hinges on whether a federal statute is remediable under § 1983 or if that question is more properly resolved pursuant to Federal Rule of Civil Procedure 12(b)(6). Heeding the lesson of *Steel Company v. Citizens for a Better Environment*, we will assume, without deciding, that subject matter jurisdiction is implicated by the question whether § 1983 provides a remedy for the alleged FERPA violation and thus resolve that question before addressing the merits of Falvo's FERPA claim. *See* 523 U.S. 83, 95 (1998)

(discussing federal appellate court's duty to decide whether it has jurisdiction, even when jurisdiction is not challenged by parties, before addressing the merits of the appeal).

In *Wilder v. Virginia Hosp. Ass'n*, the Supreme Court stated, "A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself."[6] 496 U.S. 498, 508 (1990) (quotations omitted). To resolve the first part of this test, this court must decide

> whether the provision in question was intend[ed] to benefit the putative plaintiff. If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Id. at 509 (citations and quotations omitted).

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[6] Some courts have concluded that in *Suter v. Artist M.*, 503 U.S. 347 (1992), the Supreme Court imposed additional requirements upon this analytical framework. *See, e.g., Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258, 262-63 (1st Cir. 1993). This court, however, has held that any analytical additions announced in *Suter* are "no longer to be followed" in light of post-*Suter* Congressional action. *Stanberry v. Sherman*, 75 F.3d 581, 584 (10th Cir. 1996); *see also Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (employing the pre-*Suter* analytical framework).

The plain language of the relevant provision of FERPA, 20 U.S.C. § 1232g(b)(1), reveals that it is intended to protect the privacy of students and their parents. Moreover, the sponsors of the amendment to FERPA which added this particular provision stated, "The purpose of the Act is two-fold – to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." 120 Cong. Rec. 39862 (Dec. 13, 1974) (Joint Statement in Explanation of Buckley/Pell Amendment). The relevant provision of FERPA, therefore, was intended to benefit Falvo and her children. Additionally, this provision reflects a binding obligation on schools, rather than a mere Congressional preference for a certain kind of conduct. Under the provision, an educational agency or institution is absolutely precluded from receiving federal funds if it maintains a policy or practice of allowing disclosure of education records to unauthorized individuals or entities without parental consent. *See* 20 U.S.C. § 1232g(b)(1). The language of this provision is akin to other statutory language which the Supreme Court has interpreted as creating "precise requirements." *Suter v. Artist M.*, 503 U.S. 347, 361 n.12 (1992); *see also Belanger*, 856 F. Supp. at 46, 47. Finally, as this court's statutory analysis, *infra*, makes clear, the interest which Falvo asserts is neither vague nor amorphous and is thus within the competence of the judiciary to enforce. We therefore conclude 20 U.S.C. § 1232g(b)(1) creates an enforceable right within the meaning of § 1983.

This conclusion raises a rebuttable presumption, under the second part of the *Wilder* test, that Congress did not

impliedly foreclose a § 1983 remedy by creating a comprehensive remedial scheme within FERPA itself.[7] *See Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *Wilder*, 496 U.S. at 520-21. "We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423-24 (1987) (quotation omitted). In only two cases has the Supreme Court concluded that a sufficiently comprehensive scheme exists within a statute to demonstrate Congress' intent to foreclose a § 1983 remedy. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-20 (1981); *Smith v. Robinson*, 468 U.S. 992, 1011 (1984), *overruled by statute on other grounds as recognized in Fontenont v. Louisiana Bd. of Elementary and Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986). The statutes in both of those cases contained extensive remedial schemes, including noncompliance orders, local administrative procedures, civil suits, and criminal penalties. *See Sea Clammers*, 453 U.S. at 13-14; *Smith*, 468 U.S. at 1009. FERPA's remedial scheme is far more limited.

The only remedy Congress provided within FERPA itself is allowing the Secretary of Education to cut off federal funding to educational institutions that violate the statute. *See* 20 U.S.C. § 1232g(b), (f). In FERPA, Congress also directed the Secretary of Education to "establish or designate an office and review board within the Department [of Education]" to investigate, process,

[7] Congress did not "expressly . . . forbid[ ] recourse to § 1983 in the statute itself." *Blessing*, 520 U.S. at 341.

review, and adjudicate FERPA violations and complaints alleging such violations. *See id.* § 1232g(g). The Department of Education, in accordance with Congress' directive to "take appropriate actions to enforce" FERPA, has promulgated regulations which establish more detailed administrative proceedings through which a parent or student may seek to remedy a FERPA violation. *Id.* § 1232g(f); *see* 34 C.F.R. §§ 99.60-.67. Ultimately, however, the only remedy which a complaining parent or student may obtain through these proceedings is the same which Congress itself set out in the statute: the Secretary of Education may terminate the violating institution's federal funding. *See* 34 C.F.R. § 99.67.

In *Wright*, the Supreme Court concluded that an administrative scheme in the federal Housing Act, which provided the administering agency the power to audit, enforce contracts, *and cut off federal funds*, was "insufficient to indicate a congressional intention to foreclose § 1983 remedies." 479 U.S. at 428; *see also Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 522. Pursuant to Supreme Court precedent, therefore, this court must conclude that the only remedy provided for in FERPA and its associated regulations – the termination of federal funding – is not sufficiently comprehensive to "raise a clear inference" of Congressional intent to foreclose a § 1983 remedy. *Wright*, 479 U.S. at 425; *see also Fay*, 802 F.2d at 33 ("Although FERPA authorizes extensive enforcement procedures created by regulation, these regulations do not demonstrate a congressional intent to preclude suits under section 1983 to remedy violations of FERPA." (citation omitted)); *Achman*, 45 F. Supp.2d at 673-74; *Maynard*, 876 F. Supp. at 1107.

This court, therefore, has subject matter jurisdiction over Falvo's appeal of the district court's dismissal of her FERPA claim, because the specific violation of FERPA which she alleged is actionable under § 1983.

2. *Merits*

In assessing Falvo's claim under FERPA, this court shifts its analytical mode from that employed in resolving her constitutional claim. When asked to pronounce the existence of a previously unrecognized constitutional right, this court must proceed with great caution, because "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720.[8] Constitutional scrutiny is thus cloaked in a "backdrop of history, tradition, and practice"; it requires vigilance that the examination is not subtlely driven by the personal "policy preferences of the [m]embers of [the] [c]ourt,"

[8] This court recognizes that in *Washington v. Glucksberg*, the question presented was whether the Constitution itself created a liberty interest in physician-assisted suicide. *See* 521 U.S. 702, 705-06 (1997). Under the law of this Circuit, a constitutionally-protected liberty interest in the non-disclosure of personal information can only arise from the Constitution and not from federal or state statutes and regulations. *See supra* notes 3-4 and accompanying text. For that reason, *Glucksberg* is relevant to resolving Falvo's constitutional claim. The applicability of *Glucksberg*, however, is not as clear in other areas of Fourteenth Amendment jurisprudence in which a statute can create a constitutionally-protected liberty interest and the only question is whether the Constitution limits the manner in which that interest can be deprived. *See supra* note 4.

unelected public officials. *Id.* at 719, 720. Statutory analysis, however, is differently clad: the court weighs the words of elected legislators to resolve their meaning. This court must go wherever the language and intent of the statute take us. Should our interpretation cause public discomfort or impose undesired burdens, it is to the source of the enactment, Congress, that those who are discomforted or burdened must turn for relief. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). With that approach in mind, we proceed to examine Falvo's claim under FERPA.

FERPA prohibits educational agencies or institutions from maintaining "a policy or practice of permitting the release of *education records* (or personally identifiable information contained therein . . .) of students without the written consent of their parents" to anyone other than statutorily-designated authorities or individuals, which does not include other students. 20 U.S.C. § 1232g(b)(1) (emphasis added). The statute defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are *maintained* by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A) (emphasis added).

The district court granted the School District's summary judgment motion on Falvo's FERPA claim because it concluded the grades of Falvo's children which were revealed to other students were not "maintained" by the School District and thus do not constitute "education records" within the meaning of FERPA. In so ruling, the district court gave deference to the interpretation set out

both in a 1993 letter (the "Rooker letter")[9] written by LeRoy S. Rooker, the Director of the Family Policy Compliance Office ("FPCO") within the United States Department of Education, and in a 1999 sworn declaration by Rooker (the "Rooker declaration") that the Rooker letter states the current position of the FPCO regarding the grading practice. On appeal, Falvo contends the district court both improperly deferred to the interpretation in the Rooker letter and Rooker declaration and misconstrued the statute. This court agrees with both of these contentions and thus concludes that the district court erroneously determined the term "education records" within FERPA does not encompass the grades at issue here.

The district court erred in granting deference to the Rooker letter and declaration for two reasons. First, as discussed *infra*, the meaning of the terms "education records" and "maintain" are clear from the statute itself, and a court can only defer to an agency's interpretation if a statute is deemed ambiguous. *See Chevron, U.S.A., Inc. v.*

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[9] The Rooker letter was drafted in response to inquiries made by a union representative of the New York State United Teachers about the legality under FERPA of certain practices by school officials. It states,

> FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (holding that when a court is asked to construe an ambiguous statute, it must defer to the interpretation set out in a regulation promulgated by the agency charged with administering the statute, so long as the agency's interpretation is reasonable). Second, even if the relevant statutory language was ambiguous, the Supreme Court recently announced that *Chevron* deference does not extend to an interpretation contained in an opinion letter issued by the administering agency. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000). The district court thus erred in affording *Chevron* deference to the Rooker letter and declaration.

The Supreme Court did state, however, that interpretations contained in agency opinion letters "are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)." *Christensen*, 120 S. Ct. at 1663. In *Skidmore*, the Court earlier stated that the weight which a court should afford such non-binding agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. Even if the language of FERPA was ambiguous, the Rooker letter and declaration would carry minimal persuasive power under *Skidmore*.

A statement of qualification contained earlier in the letter indicates that in issuing the opinion, the FPCO may not have thoroughly considered the issue before this court. That portion of the letter states,

> Because you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District's participation in the activities would violate rights afforded parents by FERPA. However, below is a general discussion of FERPA as it relates to the types of activities you present.

Additionally, the Rooker letter and declaration are bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not "maintained" as required under FERPA. The Rooker letter's power to persuade is further diminished because it rests its statutory interpretation on the conclusion that the grades are not " 'maintained' by an educational agency or institution," ignoring the broader language of FERPA which encompasses records "maintained by an educational agency or institution *or by a person acting for such agency or institution*." 20 U.S.C. § 1232g(a)(4)(A)(ii) (emphasis added). The Rooker declaration, however, which was submitted in the instant case over five years after the Rooker letter was issued, at least indicates the FPCO's interpretation of FERPA as it relates to the grading practice has been consistent for some time. Nonetheless, because the Rooker letter and declaration lack sufficient reasoning, fail to account for the breadth of FERPA's language, and indicate the FPCO's somewhat cursory and purely hypothetical consideration of the issue before this court, the interpretation of FERPA offered in those documents is not persuasive.

Based purely on the language of the statute itself, this court concludes the grades which students record on one

another's homework and test papers and then report to the teacher[10] constitute "education records" under FERPA. The statute provides that "education records" are "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained . . . by a person acting for [an educational] agency or institution." *Id.* § 1232g(a)(4)(A). There is no dispute that the grades which students place on each other's papers and then report to the teacher "contain information directly related to a student" and thus satisfy the first element of the statutory definition for "education record." *Id.* § 1232g(a)(4)(A)(i). To constitute an "education record," however, these grades must also be "maintained . . . by a person acting for [an educational] agency or institution." *Id.* § 1232g(a)(4)(A)(ii).

The undisputed evidence indicates that at least some grades which students give one another and report to the teacher are then recorded in the teacher's grade book. At that later time when the grades are placed in the teacher's grade book, they are "maintained . . . by a person acting for [an educational] agency or institution" and constitute "education records." *Id.* FERPA itself provides, "The term 'education records' does not include [ ] records of instructional . . . personnel . . . which are in the sole possession of the maker thereof *and which are not accessible or revealed to any other person except a*

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[10] As mentioned *supra* note 2, the method of reporting the grade is irrelevant to our analysis, because a disclosure occurs at the earlier stage when one student grades the work of another.

substitute. . . . " Id. § 1232g(a)(4)(B)(i) (emphasis added). This language explicitly provides that records of instructional personnel, such as grade books, do not constitute "education records" *only* if they "are not accessible or revealed to any other person except a substitute." *Id.* Therefore, grade books disclosed to people other than substitute teachers, such as students, do qualify as education records. Because grade books, except those disclosed only to substitutes, fall within the statutory definition of "education records" and because one element of that definition is that the records are "maintained," grade books and the grades within are necessarily "maintained" by a person acting for the educational institution, as required by FERPA.

The School District contends the language of § 1232g(a)(4)(B)(i) categorically excludes grade books, and hence, the grades at issue in the instant case, from the definition of "education records." The School District's proposed construction of this provision, however, defies both the plain language of this provision and a well-settled rule of statutory construction. "[A] statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). If § 1232g(a)(4)(B)(i) excludes records such as grade books from the definition of "education records" in an unqualified manner, as the School District urges, the language "and which are not accessible or revealed to any other person except a substitute" becomes meaningless. If grade books never constitute "education records," teachers would be free under FERPA to reveal

them to anyone, thus obviating the need to provide in the statute for allowing disclosure to substitute teachers.

In its petition for rehearing, the School District argues that interpreting § 1232g(a)(4)(B)(i) as merely allowing for the disclosure of grade books to substitutes, as this court does, "renders subsection 1232g(a)(4)(B)(i) superfluous, because subsection 1232g(b)(1)(A) already provides that it is not a violation of FERPA to allow access to education records" by substitute teachers. As just explained, however, it is the School District's construction of § 1232g(a)(4)(B)(i) which renders language within that subsection meaningless. This court's interpretation of § 1232g(a)(4)(B)(i) does not suffer that same malady.

It is important to note that FERPA serves two general purposes: (1) prohibiting disclosure of private education records, the aspect of FERPA at issue in the instant case; and (2) providing parents access to their children's education records. *See id.* § 1232g(a)(1)(A), (b)(1). In light of this second purpose, § 1232g(a)(4)(B)(i), as interpreted by this court, means that a teacher may reveal a grade book to a substitute teacher without being required to also disclose that grade book to a parent; if, however, the teacher reveals the grade book to anyone other than a substitute, the grade book becomes an "education record" to which a parent gains the right to access. The School District, therefore, is wrong to assert that § 1232g(a)(4)(B)(i), which allows a teacher to disclose a grade book to a substitute only, is superfluous because such disclosure is already permitted under § 1232g(b)(1)(A). Section 1232g(a)(4)(B)(i), unlike § 1232g(b)(1)(A), permits a teacher to reveal a grade book

to a substitute *without having to also show it to a parent.* Contrary to the School District's challenge, therefore, our interpretation of § 1232g(a)(4)(B)(i) does not render that subsection superfluous, but is, in fact, the only reasonable way to construe that provision.

This court must next resolve whether grades are also "maintained . . . by a person acting for [an educational] agency or institution" at the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers. *Id.* § 1232g(a)(4)(A)(ii). The student's transmission of that recorded grade, when the teacher later receives that grade, is necessarily done to allow the teacher to use the grade in some fashion.[11] In so assisting the teacher, the correcting student becomes a "person acting for [an educational] agency or institution." *Id.* The grade the correcting student places on the paper is also "maintained," because that student is preserving the grade until the time it is reported to the teacher for further use. In sum, the grades which students mark, at the teacher's direction, on each other's homework and test papers and later report to the teacher are "maintained . . . by a person acting for [an educational] agency or institution." *Id.* This interpretation of FERPA is consistent with Congress' intent to protect from

[11] The teacher might use the grade by recording it in a grade book to calculate the student's final grade. Even if the homework or test grade never figures into the student's final grade, the teacher must still receive the grade to use it for some other purpose, perhaps to preserve, in a grade book or otherwise, a yardstick of each student's performance and progress to better develop effective teaching strategies.

disclosure grades in a teacher's grade book. If Congress intended FERPA to preclude a teacher from revealing to one student the grades of another when written in a grade book, it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book or noting them in some similar way which serves the same purposes as a grade book record.

In its petition for rehearing, the School District argues, for the first time, that two provisions within FERPA, 20 U.S.C. §§ 1232g(a)(2), 1232g(b)(4)(A), undermine our statutory interpretation. This court is first unconvinced that in resolving whether particular documents constitute education records within the meaning of FERPA, we need to look beyond the statutory definition for the term "education records" when that definitional section provides a clear answer. Moreover, this court disagrees with the School District that these two provisions demonstrate Congressional intent to exclude student-graded work from the definition of "education records."

Section 1232g(a)(2) states that educational institutions must provide parents "an opportunity for a hearing . . . to challenge the content of . . . education records." The School District asserts that Congress could not have reasonably intended to allow parents to challenge in a hearing the accuracy of a grade placed on a student's homework or test by another student. The School District, relying on a statement from the legislative history, contends Congress only meant to afford parents a procedural right to challenge "institutional records."

To the contrary, Congress could have sensibly intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers. Indeed, a challenge to "institutional records" such as a semester grade might necessarily require an investigation into the accuracy of the individual homework and test grades used to calculate the final semester grade. Moreover, the notion that a parent should have a right to raise such a challenge is neither beyond the pale of possible Congressional intent, nor does it "trivialize" such intent, as the School District asserts. Imagine a student who, perhaps out of juvenile malice, consistently records grades on another student's papers which are lower than that which the student actually earned. Such inaccurate student grading could significantly impact the slighted student's more permanent grades. In such a situation, a parent has a definite and strong need to challenge the accuracy of the student-recorded grades. Under this court's view, FERPA provides the necessary recourse. Reading § 1232g(a)(2) on its face, therefore, does not, as the School District contends, illuminate the meaning of the term "education records."

As to the legislative history noted by the School District, this court need not test those murky waters because we conclude the statutory language defining "education records" is clear on its face. It is because expressions in legislative history often lack the precision and clarity which we expect from the language of enacted statutes that this court generally does not look to such history when construing a statute unless the statutory language itself is ambiguous. *See United States v. Ron-Pair Enterprises*, 489 U.S. 235, 241-42 (1989); *Starzynski v.*

Sequoia Forest Indus., 72 F.3d 816, 820 (10th Cir. 1995). Even if this court were to consider legislative history, we are unconvinced that the cited reference to "institutional records" demonstrates a clear Congressional intent to limit the meaning of "education records" to "centralized, cumulative records." The enacted definition of "education records" within FERPA makes no reference to "institutional," "centralized," or "cumulative" records. *See* 20 U.S.C. § 1232g(a)(4).

Finally, this court disagrees that § 1232g(b)(4)(A)[12] vitiates our statutory construction. The School District asserts that this provision, in light of our conclusion that the term "education records" encompasses student-recorded grades which are provided to the teacher, would require *individual teachers* to maintain a record (an "access record") indicating every individual or entity which has

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[12] Section 1232 g(b)(4)(A) provides,

> Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals . . . , agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such a record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 U.S.C. § 1232g(b)(4)(A).

requested or obtained access to the student's graded homework or tests and identifying that person's or entity's interest in accessing the student's education records. Such a requirement, the School District contends, runs contrary to Congress' intent expressed in § 1232g(b)(4)(A) to allow a central custodian to maintain such access records. This argument is unavailing, however, because nothing in this court's interpretation of the term "education records" would prohibit a central custodian from maintaining these access records, as the School District seems to fear.

In sum, because a reading of the plain language of FERPA demonstrates that the term "education records" encompasses the grades at issue in the instant case, this court concludes the district court erred when it resolved that the grading practice did not offend FERPA.[13]

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[13] The School District justifies the grading of homework and tests by other students on two grounds: (1) it allows immediate feedback to the students; and (2) it relieves the teacher of the time-consuming task of correcting the papers. FERPA, however, forbids neither the practice nor the benefits. The statute does not prohibit students from correcting papers if done anonymously or with the consent of parents. *See* 20 U.S.C. § 1232g(b)(1). Furthermore, the evidence establishes that not all teachers have their students grade one another's work. As a consequence, there necessarily exist further alternatives to the practice of having students correct other students' papers without parental consent or anonymity. In its petition for rehearing, the School District itself recognized two additional techniques which teachers may employ to avoid liability – collecting and passing out papers themselves or placing graded papers in sealed envelopes. There are still other means by which teachers can continue to work efficiently and effectively without violating FERPA. For example, if a teacher would like one student to collect from the others self-graded papers, the teacher can simply direct the students to turn their papers over so the grade is not revealed. Similarly, if a teacher does not wish to personally hand out graded papers, the teacher may have the students come to retrieve the papers one at a time, so they do not see each others' grades; alternatively, the teacher could fold over the papers to conceal the students' grades but not their names and thus allow a student to hand back the papers. The School District's protestations that this opinion somehow marks the end of the world for teachers, therefore, are far exaggerated.

D. Qualified Immunity

In their cross-motion for summary judgment, the individual defendants argued they are entitled to qualified immunity. Despite ruling that the grading practice violated neither the Fourteenth Amendment nor FERPA, the district court concluded that qualified immunity does not protect the individual defendants because "the rights of privacy under FERPA and the Fourteenth Amendment were clearly established at the time of the alleged violations." On appeal, the individual defendants contend the district court's qualified immunity ruling was erroneous and that qualified immunity provides an alternative basis to affirm the district court's summary judgment ruling in favor of those individuals. Contrary to Falvo's assertion that this issue is not properly before this court because the individual defendants failed to file a cross-appeal, this court may affirm the district court's ruling on any basis supported by the record. *See Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990) ("Because we may affirm the trial court's decision on any grounds supported in the record,

we proceed to consider the qualified immunity defense.").

When a public official raises a qualified immunity defense in a § 1983 lawsuit, the plaintiff bears the burden of establishing (1) "that the defendant's actions violated a federal constitutional or statutory right," and (2) "that the right violated was clearly established at the time of the conduct at issue." *Horstkoetter v. Department of Pub. Safety*, 159 F.3d 1265, 1277, 1278 (10th Cir. 1998) (quotation omitted). Having concluded that the grading practice violates FERPA, this court must further determine whether Falvo has demonstrated that the right she and her children enjoy under FERPA was clearly established at the time the individual defendants permitted the grading practice.

A right is "clearly established" when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Although a plaintiff need not show that the very action in question was previously held unlawful, she must demonstrate that there is a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Horstkoetter*, 159 F.3d at 1278 (quotation and citation omitted). Falvo has presented no case law whatsoever which concludes that FERPA creates a right to prevent the disclosure of homework, test, or similar grades, nor is this court aware of any such legal authority. Moreover, although this court does not deem the Rooker letter or declaration to be persuasive, the FPCO's statutory interpretation contained

in those documents suggests that the right which we elucidate today was not clearly established. The individual defendants are thus entitled to qualified immunity in the instant suit.[14] Because the qualified immunity doctrine only protects these individual defendants from liability for monetary damages and not from injunctive remedies, however, Falvo may pursue a claim for injunctive relief against these individual defendants in their official capacities. *See Jones v. City & County of Denver*, 854 F.2d 1206, 1208 n.2 (10th Cir. 1988);

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[14] We recognize the existence of authority, albeit not in this Circuit, which holds that qualified immunity is unavailable to a defendant who violates a right arising from an unambiguous statute. *See Jackson v. Rapps*, 947 F.2d 332, 339 (8th Cir. 1991). That rule does not apply in the instant case, however, because prior to this court's construing FERPA and concluding it unambiguously prohibits the grading practice, the very agency charged with administering that statute, the FPCO, had put forward a directly contrary interpretation. *See* 20 U.S.C. § 1232g(f), (g) (designating to the Secretary of Education the authority to enforce and address violations of FERPA and to establish a review board to investigate, process, review, and adjudicate such violations); 34 C.F.R. § 99.60(b) ("The Secretary [of Education] designates the [FPCO] . . . to: (1) Investigate, Process, and review complaints and violations under [FERPA] and this part; and (2) Provide technical assistance to ensure compliance with [FERPA] and this part."). We cannot expect educators to more accurately interpret a law than that law's administering agency; educators should be able to rely on the FPCO's opinions, in the absence of already existing, conflicting case law, regarding permissible practices under FERPA. To apply the rule set out by the Eighth Circuit in *Jackson* in the instant case, therefore, would undermine the purpose of qualified immunity, which aims to protect all but the objectively unreasonable. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987)

DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 718 (10th Cir. 1988).

IV. CONCLUSION

Because the grading practice which Falvo challenges does not implicate a Fourteenth Amendment right, this court **AFFIRMS** the District Court for the Northern District of Oklahoma's grant of summary judgment in favor of all defendants on the Fourteenth Amendment claim. Nevertheless, that grading practice does violate FERPA, and we thus **REVERSE** the district court's grant of summary judgment in favor of the School District on Falvo's FERPA claim.[15]

On the basis of qualified immunity, this court also **AFFIRMS** the grant of summary judgment in favor of the individual defendants on Falvo's FERPA claim for monetary relief. Because qualified immunity does not protect the individual defendants from liability for injunctive relief, however, we **REVERSE** the district court's grant of summary judgment in favor of the individual defendants on Falvo's FERPA claim for injunctive relief. This court **REMANDS** for further proceedings consistent with this opinion.

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[15] The School District, however, will only be liable if Falvo can demonstrate "that the [illegal] actions of an employee were representative of an official policy or custom of [the School District], or were carried out by an official with final policy making authority with respect to the challenged action." *Seamons v. Snow*, 206 F.3d 1021, 1028 (10th Cir. 2000).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, et al., Plaintiffs, vs. OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, et al., Defendants.	)	No. 98-C-765-K

ORDER

(Filed April 26, 1999)

Before the Court are the cross-motions of the parties for summary judgment. Plaintiffs have brought this action seeking damages and a declaratory judgment that the defendants have violated their rights under both the Fourteenth Amendment and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. The Court has previously denied plaintiffs' motion for temporary restraining order. The Court hereby incorporates by reference the findings of fact made in the Court's order of October 16, 1998.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) F.R.Cv.P. When applying this standard,

the Court views the evidence and draws reasonable inferences therefrom in the light most favorable to the non-moving party. *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998).

Plaintiffs (Kristja J. Falvo and her minor children, Elizabeth Pletan, Philip Pletan and Erica Pletan), contend that the grading practice utilized by some teachers at the Owasso School District, by which students exchange papers and grade each others' work as the teacher goes over the answers, is improper under the law. Plaintiffs also object to the practice of some teachers of permitting students to announce their grades aloud after their papers have been graded and returned.

FERPA provides in pertinent part that an educational agency or institution "which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents" is in violation of FERPA. 20 U.S.C. § 1232g(b)(1). This provision contains certain qualifications and exceptions which are not applicable here. FERPA defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). *See also* 34 C.F.R. § 99.3.

Defendants place principal reliance upon a declaration under penalty of perjury executed by LeRoy S. Rooker. Mr. Rooker is the Director of the Family Policy Compliance Office ("FPCO") within the United States Department of Education. In the declaration, Mr. Rooker

states that the current position of the FPCO on the issue of students grading other students' papers is accurately reflected in a letter date-stamped July 15, 1993, from Mr. Rooker to Mr. Wallace N. Raupp, II. This letter was introduced into evidence before this Court during the hearing on motion for temporary restraining order. In the letter, Mr. Rooker opines that FERPA does not prohibit teachers from allowing one student to grade the paper of another student, or from calling out the grade in class.

The Secretary of Education has been delegated by Congress with the task of enforcing FERPA. 20 U.S.C. § 1232g(f). "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

The rationale of the Rooker letter is that grades on interim tests and homework assignments are not "maintained" by an educational agency or institution at the point of grading. Plaintiffs object that such an interpretation is contrary to congressional intent, because Congress has defined the word "maintain" in another statute as including any collection or use of the material. 5 U.S.C. § 552a(a)(3). Plaintiffs describe this separate statutory scheme, the Privacy Act, as "FERPA's sister statute", and apparently seek to incorporate that Act's definition into FERPA.

In the absence of definition within the statute, statutory terms are to be construed in accordance with their ordinary meaning. *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir.1998). The term "maintain" is not defined in

FERPA; therefore, the ordinary meaning of "preserve" or "retain" is appropriate. If Congress wished to incorporate into FERPA the special definition given "maintain" in the Privacy Act, Congress knew how to do so. There is no authority holding that the Privacy Act and FERPA are to be construed in pari materia, and the Court declines to do so. In sum, the Court finds deference is due the Department of Education's interpretation of FERPA because it is reasonable and does not conflict with the expressed intent of Congress[1]. Plaintiffs' claim under FERPA fails.

Plaintiffs also bring a separate claim grounded in the Constitution itself. It is established that there is a constitutional right to privacy in preventing disclosure by the government of personal matters. *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir.1995). In resolving such a claim, the Tenth Circuit has established a three-part balancing test. The Court must consider (1) if the party asserting the right has a legitimate expectation of privacy, (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner. *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir.1989).

The *Flanagan* court affirmed a district court's grant of summary judgment against a plaintiff on the first prong

[1] The plaintiff has submitted three affidavits by experts, which argue for a contrary interpretation of FERPA. The Court finds that these largely take the form of expressing opinions as to what the law *should* be, and do not raise a genuine issue of material fact in this case. Further, as defendants note, one of the experts, Professor Friedman, has written an article in which he concedes that FERPA as written "probably" does not prohibit the public announcement of grades in the classroom. (Defendants' Exhibit B).

of the test. The court stated that there is no absolute right to privacy in the content of personnel files, but only "highly personal information" is protected. *Id.* The court found the items under review were not "highly personal" because they dealt only with the plaintiffs' work as police officers. Similarly, the interim tests and homework assignments deal with a student's performance *qua* student. In this Court's view, they are not "highly personal" matters worthy of constitutional protection.

In any event, students are given the option of having their grade related in confidence. Moreover, as this Court has previously found, students do not grade 9-week exams given at the Owasso Public Schools. No revelation is made of a letter grade on a report card or from a student's permanent transcript. Having found that the plaintiffs do not have a legitimate expectation of privacy in the items in question, the Court need not address the remaining two prongs of the balancing test. However, the Court wishes to state that it would be hard-pressed to find that this grading practice at the Owasso School District is supported by a compelling state interest. The record reflects that many teachers, even in this immediate geographical area, do not employ the student grading method. Therefore, a showing stronger than merely pronouncing "education" as a compelling state interest would have to be made before it could be demonstrated to this Court's satisfaction that the grading method under review could not undergo modification while still properly educating students. The issue before the Court is whether a constitutional violation has occurred *under these facts*, and the Court finds it has not.

In the alternative, defendants have argued that they are entitled to summary judgment based upon qualified immunity. The Court disagrees. Because the rights of privacy under FERPA and the Fourteenth Amendment were clearly established at the time of the alleged violations, the defendants are not entitled to qualified immunity. *See Mick v. Brewer,* 76 F.3d 1127, 1134 (10th Cir.1996). This is a distinct issue from whether a violation in fact took place, which the Court has already discussed.

Plaintiffs also have pending a motion for class certification. The Court elected to address the merits initially. Because the Court has found that the named plaintiffs have failed to present a claim which survives summary judgment, no ruling on class certification is necessary.

It is the Order of the Court that the motion of the plaintiffs for partial summary judgment (#16) is hereby DENIED. The cross-motion of the defendants for summary judgment (#20) is hereby GRANTED. The motion of the plaintiffs for class certification (#12) is hereby DENIED as moot.

ORDERED this 23 day of April, 1999.

/s/ Terry C. Kern
TERRY C. KERN, Chief
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, et al.,	)	
Plaintiffs,	)	
vs.	)	No. 98-C-765-K
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, et al.,	)	
Defendants.	)	

ORDER

(Filed Oct. 16, 1998)

This matter came on for hearing on October 14, 1998 on the motion of the plaintiffs for temporary restraining order. Upon consideration of the pleadings and the evidence presented at the hearing both by testimony and exhibit, the Court hereby enters its Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff Kristja J. Falvo is the mother of Elizabeth, Philip and Erica Pletan, three children presently enrolled in the Owasso School District. Ms. Falvo and the three children are named plaintiffs in this action.

2. Elizabeth Pletan is a 14 year old 8th grade student; Philip Pletan is a 12 year old 7th grade student; Erica Pletan is an 11 year old 6th grade student.

3. Defendant Owasso Independent School District NO. I-011 is a public school district authorized by 70 O.S. §1-101 et seq. to operate and control Owasso Public Schools.

4. Some teachers at the Owasso Public Schools, including teachers of each of the three plaintiff children, engage in the practice of having students exchange papers for grading. The teacher then asks that the grade received be orally announced by the student whose paper was graded by a fellow student. Students are supposed to be given the option of approaching the teacher to announce their grade in private. The teacher then enters the result in a grade book.

5. As a result of the practice, plaintiff children have experienced ridicule (Philip), incorrect grading (Elizabeth) and been asked to change grades of fellow students (Erica).

6. Teachers at the Owasso Public Schools employ the practice for purposes of giving the students "immediate feedback". Because of class size, if a teacher personally graded each paper, there would be delay in getting homework or quiz results to students. Further, not as much material would be covered. Students do not grade 9-week exams given at the Owasso Public Schools. The rationale given for not permitting a student to grade his or her own paper is the temptation of cheating.

7. Not every teacher employed by the Owasso Public Schools employs the practice of student grading, and no written guidelines exist as to its employment. The decision is left to the individual teacher. Bob Coke, the principal of the 7th grade center, testified that he "didn't

think" a teacher would require a student to call out a grade without the option of approaching and relating the grade in private, but this testimony makes it apparent that a teacher could presently do so in the teacher's discretion.

To the extent any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

Conclusions of Law

1. This Court has jurisdiction over this action pursuant to 28 U.S.C §1331.

2. Venue is proper in this Court pursuant to 28 U.S.C. §1391.

3. When the opposing party has notice of the request for a temporary restraining order, as in this case, "the procedure that is followed does not differ functionally from that on an application for a preliminary injunction. . . . " 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, §2951 at 254 (2d ed. 1995).

3. [sic] To obtain injunctive relief, the moving party has the burden of establishing that (1) the movant will suffer irreparable injury unless the injunction issues, (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party, (3) the injunction, if issued, would not be adverse to the public interest and (4) there is a substantial likelihood that the moving party will succeed on the merits. *Walmer v. U.S. Dept. of Defense*, 52 F.3d 851, 854 (10th Cir.1995).

5. When a party seeking injunctive relief satisfies the first three requirements, the standard for meeting the fourth "probability of success" prerequisite becomes more lenient. The movant need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make the issue ripe for litigation and deserving of more deliberate investigation. *Id.*

7. [sic] However, injunctions which seek to modify, rather than maintain, the status quo, are subjected to a higher standard. The movant is required to demonstrate that the factors supporting injunctive relief "weigh heavily and compellingly in the movant's favor." *SCFC ILC, Inc. v. Visa USA*, 936 F.2d 1096, 1098-99 (10th Cir.1991). The present motion requests modification of the status quo by asking this Court to prohibit the present grading practices in the Owasso Public Schools.

8. Plaintiffs bring this action pursuant to the Family Educational Rights and Privacy Act ("FERPA") and 42 U.S.C. §1983. The only two circuits to have addressed the issue have held that FERPA does not create a private right of action, but that plaintiffs may assert 42 U.S.C. §1983 claims premised on FERPA violations. *Fay v. South Colonie Century School Dist.*, 802 F.2d 21 (2d Cir.1986); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir.1990). The Court will follow these decisions for purposes of the present motion.

9. FERPA provides in pertinent part that an educational agency or institution "which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents" is

in violation of FERPA. 20 U.S.C. §1232g(b)(1). This provision contains certain qualifications and exceptions which are not applicable here.

10. FERPA defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A). *See also* 34 C.F.R. §99.3.

11. Plaintiffs have presented some evidence of humiliation and/or ridicule and uncomfortable peer pressure as a result of the student grading policy. Normally, such allegations would not suffice to establish "irreparable" harm. Such harm can be remedied through an award of money damages at trial on the merits. However, in view of the age of children plaintiffs, arguably the trauma which they have suffered affects their general ability to learn. Such a view is suggested, but not directly stated, in the affidavit of Eldon Storer, Assistant Professor of Instruction at Northeastern State University, attached to the plaintiffs' reply brief. A suggestion is not sufficient to establish that a factor weighs "heavily and compellingly" in plaintiffs' favor. It could also be argued that the very notion of "confidentiality" suggest that once such material is revealed, it cannot be re-concealed. In the case at bar, however, such a finding begs the question of whether these scores are in fact protected by FERPA. Even if protected, the revelation of a daily test score is not as damaging as a semester grade or other education records. The Court is not persuaded that the first factor has been established under the applicable burden of proof.

12. The Court is also not persuaded as to the second prong. In the context of this case, the Court believes it should not limit its view of countervailing harm to the school itself, but to the students within that school. While plaintiffs have established harm, the evidence likewise reflects that ordering an alteration of grading policy in the middle of the school year could cause disruption for Owasso Public Schools and its students. If teachers are not able to provide for the grading of papers, students will only receive their results after delay, or teachers will begin assigning less homework and quizzes. This may have a detrimental effect upon both teaching and learning. The Supreme Court has stated that courts "do not . . . intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *See also Wisconsin v. Yoder*, 406 U.S 205, 235 (1972) ("[C]ourts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education.") Under the heightened standard for this type of injunction, the Court is not persuaded that plaintiffs have shown that the second prong weights "heavily and compellingly" in their favor.

13. For similar reasons, the Court is not persuaded that plaintiffs have demonstrated by the requisite burden of proof that the requested temporary restraining order would not be adverse to the public interest. The practice of student grading is not limited to the Owasso schools, and has been employed in the United States for decades. At least, further factual development is required before

this Court enjoins its use. Thus, the third prong has not been met.

14. Finally, the Court concludes that plaintiffs have not established "heavily and compellingly" that they are likely to prevail on the merits. Defendants have submitted to the Court a letter, apparently written in 1993, which purports to be from one Leroy S. Rooker, Director of the Family Policy Compliance Office of the United States Department of Education. The Secretary of Education is given authority to enforce FERPA. *See* 20 U.S.C. §1232g(f). The letter purports to have been sent from Mr. Rooker to Mr. Wallace N. Raupp, II, Labor Relation Specialist for New York State United Teachers. The Letter states that it is in response to inquiries about whether certain activities violate FERPA. On the first page, one sentence states: "FERPA is not . . . intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions." On the second page, a paragraph states:

> Likewise, FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

Plaintiffs object to the letter as hearsay. The Court has decided to consider the letter. Defendants were given less

than a day's notice of the hearing in this matter. It is unrealistic to expect them to produce fully authenticated documents or affidavits at this stage. "[I]nasmuch as the grant of a preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had." 11A Write, [sic] Miller & Kane, §2949 at 217. *See also Asseo v. Pan American Grain Co.*, 805 F.2d 23, 26 (1st Cir.1986) (the dispositive question is not whether materials are hearsay, but whether this type of evidence is appropriate, given the character and objectives of an injunctive proceeding).[1]

Plaintiffs have presented the view of Professor Storer by affidavit that he "disagree[s]" with the Rooker analysis of FERPA. However, this very disagreement indicates that the heightened burden of proof which plaintiffs face has not been met as to the fourth prong. This is even more true in this instance, in which the letter purports to be an interpretation of a statute by the agency charged with enforcing that statute. This raises the issue of possible judicial deference to that interpretation. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Needless to say, this Court's ruling is an interlocutory one for purposes of resolving the present motion. If, for example, discovery proceeds and proves that the letter cannot be authenticated or does not reflect

[1] Much of plaintiffs' presentation at the hearing was in the form of hearsay, as Ms. Falvo related what her children had told her. Defendants did not object, but such objections would not have been sustained.

the present interpretation of FERPA by the Department of Education, the Court reserves the right to revisit the issue, or any other substantive issue discussed above. The heightened burden of proof which plaintiffs faced under the present motion will not be applicable to motions for summary judgment or trial on the merits, and the Court expresses no view as to the ultimate outcome.

To the Extent any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that the motion of the plaintiffs for temporary restraining order is hereby DENIED.

ORDERED this 16 day of October, 1998.

/s/ Terry C. Kern
TERRY C. KERN, Chief
UNITED STATES DISTRICT
JUDGE

APPENDIX D

PUBLISH

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KRISTJA J. FALVO, as parent and next friend of her minor children, Elizabeth Pletan, Philip Pletan, and Erica Pletan; and on behalf of others similarly situated	)	
Plaintiff-Appellant,	)	No. 99-5130 (D.C. No. 98-CV-765-K)
v.	)	
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a/ Owasso Public Schools; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; JOHN DOE, sued as: Does 1 through 50,	)	
Defendants-Appellees.	)	

ORDER

(Filed October 4, 2000)

Before **SEYMOUR, Chief Judge, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO** and **MURPHY**, Circuit Judges.

This matter is before the court on appellees' petition for rehearing with suggestion for en banc review to which appellant has responded. Upon the original panel members' consideration of the rehearing petition, the request was denied.

The suggestion for rehearing en banc and appellant's response were transmitted to all of the judges of the court who are in regular active service. *See* Fed. R. App. P. 35. A poll was requested. A majority of the active judges voted, however, to deny the request for en banc review. Judges Tacha, Baldock, Brorby, and Kelly voted to grant the en banc suggestion.

Although the request for rehearing is denied, the panel has determined, on its own motion, that the original decision filed on July 31, 2000, shall be amended. Consequently, the original opinion is withdrawn. The amended opinion shall be filed forthwith.

The panel has taken appellant's requests for attorney's fees and costs under advisement.

KELLY, Circuit Judge, dissenting, with whom **TACHA, BALDOCK** and **BRORBY**, Circuit Judges, join.

I respectfully dissent from the court's denial of rehearing en banc. The court has determined that the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, is violated by a grading practice that allows students to grade one another's papers because the grades constitute "education records," *id.* § 1232g(a)(4)(A), that cannot be released to other students. Defining "education records" to include "grades which students record on one another's homework and test papers and then report to the teacher," Amended Ct. Op. at 22, is a vast expansion

of the actual words of the statute, and unsupported by the legislative history.

The grades that students record on one another's papers simply do not meet the second element of the definition of "education records," any more than the papers themselves could. 20 U.S.C. § 1232g(a)(4)(A)(ii). Neither the papers nor the grades placed upon them are "records, files, documents or other materials which . . . are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* The papers (or at least the responses) belong to the student. The teacher may act for the educational agency or institution in recording the grade in a grade book (or on a spreadsheet), but it is one step removed to say that the teacher's potential receipt of that grade makes every uncompensated student that participates in the grading process "a person acting for such agency or institution."

Were there any doubt, the statute specifically provides that "education records" do not include "records of instructional . . . personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any person except a substitute." *Id.* § 1232g(a)(4)(B)(i). No one suggests that the teacher's grade book is accessible or has been revealed to any person except a substitute, or released to any person or group not within the exceptions created by 20 U.S.C. § 1232(b)(1). If the teacher's grade book normally does not constitute an "education record," how can it be that individual grades on papers can be "education records?"According to the court, if grades in a grade book revealed to someone other than a substitute are "education records," the grades prior to entry must also

be protected because they are disseminated to other students. *See* Amended Ct. Op. at 26.[1] The statute makes no mention of grades prior to entry being "education records," and had Congress intended such an important change in this sensitive area, surely Congress would have included express language to that effect. Relying "purely on the language of the statute itself," *id.* at 22, however, the court attributes its conclusion solely to Congressional intent. There is an obvious difference, however, between grades entered in a grade book (a collective record of the teacher) and the individual grades (on student papers) that are not recorded in a grade book. Surely Congress could have intended to protect one in limited circumstances, and not the other. Likewise, there is a difference between a final grade placed on a transcript and the individual scores that determine the final grade.

A careful reading of FERPA and its legislative history requires a much narrower definition of "education records." The school district correctly argues that extending the definition of "education records" to grades placed upon papers necessarily invokes the right to a hearing to challenge the grade, 20 U.S.C. § 1232g(a)(2), and the need

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[1] The critical part of the court's decision:

> If Congress intended FERPA to preclude a teacher from revealing to one student the grades of another when written in a grade book, it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book or noting them in some similar way which serves the same purposes as a grade book record.

Amended Ct. Op. at 26.

for an educational institution to maintain an access record indicating those who have obtained or requested access to that grade, *id.* § 1232g(b)(4)(A). Given the thousands of grades a student might receive over time, this seem impossible, if not implausible.

Congress did not intend a right to a hearing on each and every grade received. In responding to concerns regarding § 1232g(a)(2), the Joint Statement in Explanation of Buckley/Pell Amendment drew a critical distinction between an institutional record in which a grade was recorded (the accuracy of which can be challenged) and the graded material itself (the accuracy of which cannot be challenged). The Joint Statement concluded that "education records" referred only to the former. 120 Cong. Rec. 39,862 (1974).[2] While grade books may qualify as institutional records, grades on papers certainly do not.

Practical difficulties with the court's decision abound because care must be taken to insure that no student learns the grade of another. Thus, a school district should be wary of academic awards based upon grades, for the

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[2] When interpreting a statute, a court should look to its plain language, resorting to legislative history in an attempt to discern congressional intent only when the language of the statute is unclear. See *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Contrary to the court's conclusion, the definition of "education records" to encompass grades placed on papers is far from clear on the face of the statute. The court reaches its conclusion only after assuming that if Congress intended to protect grade books, it also intended to protect graded papers and tests. Thus, whether "education records" refers to graded papers is unclear from the face of the statute. In such cases, consideration of legislative history is wholly appropriate.

underlying grades may be revealed. Likewise, a determination that a student athlete is academically ineligible carries the same risk. A routine function passing out a stack of graded papers alphabetized by name will now require teacher involvement and the students cannot do it themselves for fear that one student might see another's grade, intentionally or unintentionally. This cannot be what Congress meant when it sought to protect a student's personal information and permanent academic record from unwarranted disclosure. Our teachers are overworked and underpaid now. What will happen to them when they can be sued by every irate parent or student claiming that someone saw a grade or that they were denied a fair hearing to challenge a test grade? For these reasons, I respectfully dissent from the denial of rehearing en banc.

APPENDIX E

20 U.S.C. § 1232g. Family educational and privacy rights

a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or

institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations –

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i)

the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include –

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records

can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following –

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted –

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if –

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents

[1] So in original. The period probably should be a comma.

by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or

local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless –

> **(A)** there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or
>
> **(B)** except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided,* That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be

protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph

(1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding –

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from –

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if –

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KRISTA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN; and on behalf of all others similarly situated, Plaintiffs,	Case No. 98-CV-765-K (J) CLASS ACTION
v.	
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; and Does 1 through 50, Defendants.	

DECLARATION OF LEROY S. ROOKER

I, LeRoy S. Rooker, being of lawful age, to the best of my knowledge and belief and pursuit to 28 U.S.C. § 1746 do hereby declare as follows:

1. I am the Director of the Family Policy Compliance Office within the United States Department of Education. I have been Director of the Family Policy Compliance Officer [sic] ("FPCO") for eleven (11) years. In my position, I am responsible for directing and overseeing the activities of the FPCO. Pursuant to federal law and associated regulations, 20 U.S.C. § 1232g and 34 C.F.R. Part 99, the FPCO is charged with investigating, processing, and reviewing complaints and violations under the Family Educational Rights and Privacy Act ("FERPA"), and provides technical assistance to educational agencies and institutions to ensure compliance.

2. With regard to technical assistance, the FPCO frequently receives and responds to inquiries from educational agencies and institutions covering a wide range of FERPA issues. More specifically, the FPCO has received inquiries concerning the classroom practice of teachers allowing students to grade other students' papers. The FPCO has concluded that such a practice is not prohibited by FERPA, nor does it constitutes a FERPA violation. This is so because such papers fall outside the definition of education records as they are not yet maintained by the school.

3. The current position of the FPCO on the issue of students grading other students' papers is correctly set out in the letter dated-stamped July 15, 1993, from myself

to Mr. Wallace N. Raupp, II. A copy of the Letter to Raupp is attached as Exhibit "A" to this Affidavit.

4. The FPCO position articulated in the Letter to Raupp is not new; rather, it is consistent with the Office's long-standing position on the issue of students grading other students' papers.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 26, 1999.

/s/ LeRoy S. Rooker
Declarant, LeRoy S. Rooker

Mr. Wallace N. Raupp, II
Labor Relations Specialist
New York State United Teachers
Southwestern NY Regional Office
500 Cherry Street
Jamestown, New York 14701

Dear Mr. Raupp:

This is in response to your facsimile of June 17, 1993, in which you ask on behalf of teachers at the Dunkirk City School District (District) whether certain activities violate the Family Educational Rights and Privacy Act (FERPA). The activities you list concern general practices at the District by school officials which involve disclosure of information from education records. Because you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District's participation in the activities would violate rights afforded parents by

FERPA. However, below is a general discussion of FERPA as it relates to the types of activities you present.

FERPA is intended, in part, to afford parents the right to have some control over disclosure of information from their children's education records. In this regard, it provides that information from a student's education records cannot, with certain exceptions, be disclosed without parental written consent. FERPA is not, on the other hand, intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions. Thus, a thoughtful, common sense, and flexible approach is necessary in judging the impact of some classroom activities on a student's right to privacy and vice versa.

An educational agency or institution is not prohibited by FERPA from publishing or posting the grades of students unless it is done in a personally identifiable manner. For example, FERPA would preclude a school from posting grades by social security numbers, student ID numbers, or by names because these types of information are personally identifiable to the students. However, nothing in FERPA would preclude a school from assigning code numbers to students for the purpose of posting grades as long as the use of such numbers is limited to a legitimate educational interest in having access to that information.

Likewise, FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades

which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

On the other hand, publishing student averages in a newspaper or school bulletin would generally violate FERPA if prior parental written consent is not obtained. However, publication of an honor roll is generally permissible under FERPA. Specifically, listing students' names on a published honor roll would be consistent with the part of FERPA's directory information definition that covers awards received because it could be considered honorary recognition. 34 CFR 99.3. As long as the conditions in § 99.37 have been met and the parent of a minor student has not refused disclosure of directory information, a school can publish or release to another party, such as a newspaper, a list of students on the honor roll. A copy of the regulations are enclosed for your reference.

With regard to the activities which concern a student's education records being disclosed to school officials who are not teachers of the student, FERPA would not prohibit such disclosure if the school official has been determined by the school district to have legitimate educational interest in the student's records. Since each school district is responsible for specifying in its student records policy who are school officials and what is considered a legitimate educational interest, someone with questions as to whether a specific school official, such as a coach, resource teacher, or secretary, can access a certain student's education records should refer to the district's

student records policy or seek the assistance of the appropriate administrative officials at the district level.

I trust that the above information is helpful in providing guidance to you regarding the various concerns you have raised. If you wish to have specific responses to any of the possible disclosures of information from education records which you noted in your facsimile, you may contact this Office again. At such time, please provide specific details concerning such disclosures, including the relationship of the party to the school district and to the student to whom the records relate.

Sincerely,

LeRoy B. Rooker
Director
Family Policy
Compliance Office

Enclosure

Supreme Court, U.S.
FILED
FEB 1 2001
OFFICE OF THE CLERK

(2)

No. 00-1073

In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g prohibits an educational institution's policy or practice of allowing its students to grade one another's tests and other work and/or to call out their own grades in class.

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OPINIONS BELOW

The Opinions below are attached to petitioner's Petition at Appendices A-D.

JURISDICTION

Petitioner adequately invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). Subject matter jurisdiction is likewise proper under 42 U.S.C. § 1983.

STATUTORY PROVISION INVOLVED

This case involves the statutory interpretation of the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"). Petitioner sets forth the full text of FERPA at Appendix E-1.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Owasso school district allowed its teachers to engage in the practice of having students exchange tests and quizzes for grading. The teacher then asked the students to "call out" their own grades to the teacher. The teachers testified that the purpose for "calling out" the grade was to record the grade in the grade book.

Philip Pletan, the son of respondent, was a 10 year old 5th grade student at Owasso Middle School. Philip was a special education student being "mainstreamed"

into the regular classroom. Philip was subjected to humiliation, ridicule, and loss of privacy caused by the practice of publicizing his private and confidential grades to his peers. The humiliation exacerbated when he entered the 6th grade and continued when he was in the 7th grade, where children at that age, when given the opportunity, were notorious for humiliating him as a result of the publication of his grades. During the 1997-98 and 1998-99 school years, respondent complained about the grading practice to the Owasso school district superintendent, as well as the teachers, that this policy needlessly subjected Philip and her other children Erica and Elizabeth to intimidation and indignity by allowing other students to learn their grades. The school district refused to disallow the grading practice.

B. DISPOSITION BELOW

In October 1998, respondent brought a class action lawsuit pursuant to 42 U.S.C. § 1983 against the Owasso school district, the superintendent, the assistant superintendent, and principal alleging that the grading practice violated the Fourteenth Amendment privacy rights and FERPA. After filing her complaint, respondent sought a temporary restraining order enjoining the district from engaging in the practice at issue. After an evidentiary hearing, the district court denied the relief requested and issued its findings of fact and conclusions of law.

Before the district court resolved whether to certify the class, respondent moved for declaratory and summary judgment on her two claims. Owasso filed a cross-

motion for summary judgment on both claims. The district court concluded the grading practice did not implicate a constitutionally-protected privacy interest. Additionally, the district court ruled that the grades subject to the grading practice did not constitute "education records" under FERPA. Respondent filed her motion to reconsider. The district court denied that motion.

On appeal to the United States Court of Appeals for the Tenth Circuit, respondent asserted that the district court erroneously granted summary judgment in favor of the defendants, because the grading practice violated both the Fourteenth Amendment and FERPA. The court of appeals held that although the Fourteenth Amendment did not preclude the grading practice, FERPA did.

Thus, the court of appeals affirmed the district court's grant of summary judgment on the constitutional claim and reversed the grant of summary judgment on the FERPA claim. The court of appeals also affirmed the grant of summary judgment in favor of the individual defendants on the respondent's claim for damages, but reversed the judgment on the respondent's claim for injunctive relief. Notably, the petitioners never raised issue with, and do not now raise issue with, the court's jurisdiction under § 1983. Nevertheless, the court of appeals addressed the jurisdictional issue and, in accord with all circuit courts, correctly held that a private right of action under § 1983 may be brought by respondent.

Petitioner filed for a rehearing with suggestion for *en banc* review, which was denied. Although a majority of the active judges denied the request, the panel determined on its own motion, to amend the original decision.

Notably, the argument set forth in petitioners' rehearing request was only raised for the first time in their brief for *en banc* review. In its amended opinion the court of appeals addressed those additional concerns the school district had. Circuit Judge Kelly filed his dissenting opinion from the court's denial for rehearing *en banc*.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

This case raises a question of first impression. As such, there is no conflict among the circuit courts, or any lower courts interpreting the plain language of the statutorily defined term "education records." Moreover, all circuit courts concur that FERPA provides to a student and parent a private right of action remedied under § 1983. Pet. App. at A-10. For these reasons, this Court should deny the petitioners' writ for certiorari.

II. THE DECISION IS IN HARMONY WITH THE PLAIN LANGUAGE AND PURPOSE OF THE FEDERAL STATUTE

The Tenth Circuit correctly held that the "plain language of the relevant provision of FERPA, 20 U.S.C. § 1232g(b)(1), reveals that it is intended to protect the privacy of students and their parents." The dual purpose of FERPA is to (i) ensure *parents access* of information contained within a students' "education records," and at the same time (ii) protect the information from *unauthorized disclosure*. Congress was concerned to assure that school district practices would *"not invade the privacy*

of students or *pose any threat of psychological damage to them." See* U.S. Code Cong. & Admin. News, at 4251 (1974) (Sen.Rep.No. 93-1026, 93rd Congs., 2nd Sess. 187).

FERPA prohibits educational agencies or institutions from maintaining "a policy or practice of permitting the release of *education records* (or personally identifiable information contained therein . . .) of students without the written consent of their parents" to anyone other than statutorily-defined authorities, *which does not include other students*. 20 U.S.C. § 1232g(b)(1) (emphasis added). Thus, the plain language is consistent with its dual purpose by prohibiting the release of "education records" to anyone other than the student's parent or school authority.

FERPA clearly prohibits the teacher from disclosing the grade information in the teacher's grade book to anyone other than a substitute. § 1232g(a)(4)(B)(i) (the grade book exception). This section provides that information contained in records of instructional personnel, such as grades, shall "not [be] accessible or revealed to any other person except a substitute." The court of appeals explained that "[i]f grade books never constitute 'education records,' teachers would be free under FERPA to reveal them to anyone, thus obviating the need to provide in the statute" the language: "and which are not accessible or revealed to any other person except a substitute." Pet. App. at A-22, 23.

The Tenth Circuit further explained that:

> "[i]f Congress intended FERPA to preclude a teacher from revealing to one student the grades of another student when written in a grade book, it would be incongruous to permit a

> teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book or noting them in some similar way which serves the same purpose as a grade book record." Pet. App. at A-25.

Congress obviously recognized that since the information contained within a teacher's grade book would necessarily include all students' grades, allowing a parent the right to access her child's "education records" (which includes the "grade book") would necessarily disclose the grade information of another student. This result would be an absurdity and render the statute superfluous. By its own terms, § 1232g(a)(4)(B)(i) (the grade book exception) prevents disclosure of and access to another student's grade information. Accordingly, there is no statutory ambiguity.

Indeed, the only information that may be released by the school district is identified in FERPA as "directory information." 20 U.S.C. § 1232g(a)(5)(A). Thus, "education records" relating to a student which may be released without parental consent include the following:

> "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." Pet. App. at E-5.

The statutory list does *not* include students' test scores or grades. Congress could have specifically listed grades or test scores as "directory information," yet, it

did not. Thus, any personally identifiable information not listed as "directory information" shall not be disclosed, disseminated or revealed to anyone other than the student's parent or school official.

In its petition for rehearing, Owasso argued, for the first time, that two provisions within FERPA, which are not at issue, undermine the court's interpretation. Petition at 23-28. The court of appeals, however, properly found that the statutory definition for the term "education records" provided the clear answer to the only question raised. Neither of the two provisions demonstrate Congressional intent to exclude student grades from the definition of "education records." Indeed, the court found that "the notion that a parent should have a right to raise such a challenge [to the accuracy of grades] is neither beyond the pale of possible Congressional intent, nor does it 'trivialize' such intent." Pet. App. at A-26.

Owasso further contends that § 1232g(b)(4)(A) vitiates the court's interpretation. Petition at 23-28. Nothing, however, in the court's interpretation of the defined term "education records" would prohibit a central custodian from maintaining an access record, as the school district seems to fear.

In sum, the plain language of FERPA demonstrates that the term "education records" encompasses the grades at issue in this case. Because the decision is in harmony with the plain language and purpose of the statute, this Court should deny the petition for writ of certiorari.

III. THE TENTH CIRCUIT CORRECTLY REJECTED THE DEPARTMENT OF EDUCATION'S INFORMAL LETTER OPINION UNDER *CHEVRON, SKIDMORE* AND *CHRISTENSEN*

The Tenth Circuit properly rejected the district court's deference to a Department of Education informal letter opinion under *Chevron, Skidmore,* and *Christensen*. The district court erred in granting deference to the Department of Education's Family Compliance Office ("FPCO") opinion letter ("Rooker letter"). The court of appeals rejected the Rooker letter for two reasons. First, the court found the meaning of the term "education records" was clear from the statute itself. A court may only defer to an agency's interpretation if a statute is deemed ambiguous under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Pet. App. at A-18. Second, the court of appeals explained that,

> "even if the relevant statutory language was ambiguous, the Supreme Court recently announced that *Chevron* deference does not extend to an interpretation contained in an opinion letter issued by the administering agency" under *Christensen v. Harris County*, 529 U.S. 576 (2000). Pet. App. at A-19.

Additionally, the court of appeals held that the Rooker letter would carry minimal persuasive power under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) since the letter contained a disclaimer that the FPCO had not thoroughly considered the issue before the court. Pet. App. at A-19, 20. The letter contained the following:

> "Because you do not fully explain the details surrounding the activities you identify, *it would not be appropriate* for this Office to comment *on whether the District's participation in the activities would violate rights afforded parents by FERPA.*" Pet. App. at F-3.

Rooker explains that an educational agency is prohibited by FERPA from publishing or posting the grades of students *if personally identifiable*. Yet, without reason or logic, he opines that FERPA would not prohibit the practice of "calling out" that grade. As the court of appeals found, the Rooker letter is "bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not maintained" by the school district. Pet. App. at A-20.

The Rooker letter ignores the broad language of the term "education records," the narrow term defining "directory information," and the dual purpose of FERPA. Accordingly, the Tenth Circuit correctly rejected the FPCO's informal letter opinion under *Chevron, Skidmore,* and *Christensen*.

IV. OWASSO HAS MODIFIED AND CORRECTED ITS GRADING PRACTICES WITH LITTLE OR NO INCONVENIENCE TO THE SCHOOL DISTRICT, ITS TEACHERS OR ITS STUDENTS

Owasso's assistant superintendent has recently testified by sworn affidavit that the school district is in full compliance with the Tenth Circuit order and has modified its grading practice such that the teachers do not disclose grades to anyone without authorized consent.

Res. App. at 6-7. Moreover, there exists no evidence in the record that would suggest that Owasso, or any other school district, could not properly educate students without disclosing grades.

Indeed, the district court admonished Owasso casting serious doubt as to whether "the grading method under review could not undergo modification while still properly educating students." Pet. App. at B-5. The district court stated that it would be hard-pressed to find that this grading practice is supported by any compelling interest. *Id.* Judge Kern explained that "the record reflects that many teachers, even in this immediate geographical area, do not employ the student grading method." *Id.*

The court of appeals decision, taken together with the undisputed evidence in the record, demonstrates that Owasso and its teachers could easily modify, and have indeed modified, their grading practices with little or no burden to the school district, the teachers or the students. Since the record in this case establishes that other teachers and school districts are able to meet the same curriculum objectives without disclosing students' grades, petitioners' fear that the decision will disrupt a significant educational practice is neither supported by the facts nor the law of this case.

As the lower court explained, there exist reasonable alternatives to accomplish the curriculum objectives which would not pose any onerous burden on the school district or the teachers. The court explained that FERPA forbids neither the practice nor the benefits of allowing immediate feedback or relieving the teacher of the time-consuming task of correcting tests. Pet. App. at A-28

fn.13. "There necessarily exist further alternatives to the practice of having students correct other students' papers without parental consent or anonymity." *Id.* "The statute does not prohibit students from correcting papers if done anonymously or with the consent of parents." *Id.* The record reveals several means to accomplish the educational objectives desired without releasing the students' grades. Even the school district concedes that the "students' privacy may be maintained by use of confidential identification numbers on their papers rather than the students' names." Res. App. at 7. Indeed, the fact that *other* teachers and school districts do not engage in this practice undermines petitioners' speculation.

Petitioners' concern of not being able to disclose honors and awards is resolved by the statutory grant of authority to release such student awards as provided in the "directory information." Pet. App. at E-5. Section 1232g(a)(5)(A) specifically allows the release of student award information. *Id.*

The teachers' speculation of personal liability under § 1983 is likewise unfounded, since FERPA liability would arise only from a school district official policy or practice of disclosing grades. Thus, any inadvertent release of grade information would not subject a teacher or the school district to liability if the conduct was not an official policy or practice. Quoted by the Associated Press in the August issue of the Shawnee News-Star Online, the Oklahoma Education Association president, Carolyn Crowder, explained that this ruling would not "really change the way teachers teach." And, the teachers will

"continue to use good sense in protecting students' privacy." Kurt, *Grading lawsuit ruling expected to bring warning for teachers*, Shawnee News-Star Online, Tuesday, August 1, 2000.

CONCLUSION

The Tenth Circuit's decision comports with the purposes and structure Congress intended to achieve in protecting students' educational records. Petitioners' speculative fears are unfounded by evidence of its immediate modification of the practice and available alternatives to trading tests, grading each others work and calling out those grades. Respondent maintains the decision is without error and, therefore the petition for certiorari should be denied.

Respectfully submitted,

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**Counsel of Record*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN; and on behalf of all others similarly situated,	)	**Case No. 98CV 0765K (J)**
Plaintiffs,	)	
vs.	)	
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/ka/ OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; and Does 1 through 50,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF PERMANENT INJUNCTION PURSUANT TO TENTH CIRCUIT MANDATE

(Filed Nov. 9, 2000)

The defendants, Independent School District No. 11 of Tulsa County, Oklahoma (the "Owasso School District"), Dale Johnson, Superintendent of the Owasso

School District, Lynn Johnson, Assistant Superintendent of the Owasso School District, and Rick Thomas, Principal of the Sixth Grade Center at the Owasso School District, respectfully submit this brief in opposition to the *Plaintiff's Motion for Entry of Permanent Injunction Pursuant to Tenth Circuit Mandate*, filed in this matter of October 23.[1] Unless referred to individually, the defendants will be referred to collectively as the "School District Defendants."

On October 4, 2000, the United States Court of Appeals for the Tenth Circuit denied the School District Defendants' request for a rehearing en banc of that court's July 31 decision in the captioned action. Pursuant to Rule 13(3) of the Rules of the United States Supreme Court, the School District Defendants have ninety (90) days from October 4, 2000, or until January 2, 2001, to file a petition for certiorari in the United States Supreme Court. The Board of Education of the Owasso School District will meet on Monday, November 13, 2000, to determine whether to authorize its attorneys to file a petition for certiorari with the United States Supreme Court. The undersigned counsel for the School District Defendants anticipates the Board of Education will direct the preparation and filing of a petition for certiorari.

The School District Defendants respectfully submit that Plaintiff's motion is premature. Entry of a permanent injunction at this time, given the likelihood that the School District Defendants will seek certiorari on this

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[1] This response is therefore timely filed pursuant to Rule 6(e), FED.R.CIV.P.

question of nationwide significance, would needlessly burden the parties and the courts with the filing of an additional appeal of the permanent injunction before the final resolution of the appeal of this Court's summary judgment decision. This would involve the needless use of judicial resources and would unnecessarily increase the cost of this litigation to both sides. Should the Supreme Court decline to grant certiorari, this matter can, *at that time*, be finally concluded in an efficient manner for both the parties and this Court.

The Plaintiff will not be prejudiced by declining to enter a permanent injunction at this time. Although the Plaintiff asserts in her motion that "[o]n information and belief individuals at the Owasso schools continue to violate the mandate of the Tenth Circuit ruling," the Plaintiff has offered absolutely *no evidence* in support of this allegation. Attached to this brief is the *Affidavit of Lynn Johnson*, the Assistant Superintendent of the Owasso School District, who states that *all teachers and administrators* at the Owasso School District were advised of the Tenth Circuit's decision prior to the start of classes for the current (2000-2001) school year and were advised that the Tenth Circuit has held that the grading practice challenged in this action violates federal law. Johnson's affidavit establishes that the Owasso School District has advised all of its teachers and administrators that the Owasso School District no longer allows students to exchange homework papers and in-class assignments and grade each others' work.

The School District Defendants are therefore in full compliance with the Tenth Circuit's ruling, and there is no need for the entry of a permanent injunction pending

the School District Defendants' filing of a petition for certiorari with the United States Supreme Court.

For the reason set forth in this brief, the School District Defendants respectfully request that the Plaintiff's *Motion for Entry of Permanent Injunction* be denied or, in the alternative, that it be held in abeyance pending the filing and disposition of a petition for certiorari with the United States Supreme Court.

ROSENSTEIN, FIST & RINGOLD

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Attorneys for the School District Defendants

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of November, 2000, I mailed a true, correct and exact copy of the foregoing document by United States mail, certified, return receipt requested to:

Will K. Wright
P.O. Box 423
Claremore, OK 74018

By: /s/ Karen L. Long
Karen L. Long

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN; and on behalf of all others similarly situated, **Plaintiffs,** **vs.** **OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/ka/ OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal; and Does 1 through 50,** **Defendants.**	**Case No. 98CV 0765K (J)**

AFFIDAVIT OF LYNN JOHNSON

I, Lynn Johnson, being of lawful age, after being duly sworn upon oath, state as follows:

1. This Affidavit is made on personal knowledge of facts to which I am competent to testify.

2. I am the Assistant Superintendent of the Owasso School District. I have held that position since before the inception of the present litigation.

3. On July 31, 2000, the United States Court of Appeals for the Tenth Circuit issued its decision in the instant case. The Tenth Circuit affirmed this Court's grant of summary judgment to the defendants on the plaintiff's "right of privacy claim" under the United States Constitution and reversed the summary judgment with regard to the plaintiff's claim under the Family Education Rights Privacy Act, 20 U.S.C. § 1232g ("FERPA"). The Tenth Circuit ruled that the practice followed by some teachers at the Owasso School District of having students exchange homework papers and in-class assignments and grade each others' work while the teacher went over the answers aloud in class violated FERPA, without regard to whether the student was required to announce his or her score aloud or had the option of reporting the score to the teacher in confidence. The Owasso School District timely filed a Petition for Rehearing En Banc, which was denied, with four (4) judges of the Tenth Circuit dissenting, on October 4, 2000.

4. Based on the July 31 decision of the Tenth Circuit, the Owasso School District advised *all certified employees* (administrators and teachers) that the practice of exchanging papers and having students grade each others' work had been held to be a violation of federal law and was no longer permissible. All administrators and teachers were informed prior to the start of classes for the 2000-2001 school year in August of 2000 that such grading practice would no longer be allowed at the Owasso School District.

5. This action was taken to insure that the Owasso School District and all named defendants were in compliance with the Tenth Circuit's order notwithstanding the Owasso School District's decision to seek a rehearing en banc of the original decision.

6. Prior to the start of classes for the 2000-2001 school year, the Owasso School District was advised by its legal counsel that the *only circumstances* under which one student could lawfully see the grade or score on another student's paper would be if the students' privacy was maintained by the use of confidential identification numbers on their papers rather than the students' names, or if the students' parents voluntarily signed a release under FERPA authorizing the publication of the students' scores.

7. I am not aware of any teacher at the Owasso School District utilizing either of these procedures.

Further Affiant sayeth not.

/s/ Lynn Johnson
Lynn Johnson

Subscribed and sworn to before me this 9th day of November, 2000.

Notary Public /s/ Peggy L. Morgan

My Commission Expires: Aug. 17, 2003

Supreme Court, U.S.
FILED
JUN 1 2001

No. 00-1073

In the Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, AKA OWASSO PUBLIC SCHOOLS, ET AL., PETITIONERS

v.

KRISTJA J. FALVO, PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN AND ERICA PLETAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999), prohibits the furnishing of federal funds to an educational institution that has a policy or practice of releasing, without parental consent, students' "education records," which are defined by FERPA as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A). The question presented is:

Whether allowing students to grade each other's homework and tests as their teacher goes over the correct answers aloud in class violates FERPA's prohibition against the release of "education records."

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In the Supreme Court of the United States

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OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, AKA OWASSO PUBLIC SCHOOLS, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999), provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution[1] which has a policy or

[1] For purposes of FERPA, "the term 'educational agency or institution' means any public or private agency or institution which

practice of permitting the release of education records (or personally identifiable information contained therein other than directory information [as defined in 20 U.S.C. 1232g(a)(5)]) of students without the written consent of their parents," other than in certain statutorily identified circumstances. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); see also 20 U.S.C. 1232g(b)(2). The cirumstances identified by the statute in which education records may be released without written parental consent include release to other teachers and school officials who have been determined by the institution to have legitimate educational interests, officials of other schools in which the student seeks to enroll, certain state and federal educational and law enforcement officials, persons designated in a subpoena for law enforcement purposes, victims of certain crimes at a postsecondary institution, and educational testing, financial aid, and accrediting organizations. 20 U.S.C. 1232g(b)(1)(A)-(J) (1994 & Supp. V 1999); 20 U.S.C. 1232g(b)(6)(A) (Supp. V 1999).[2]

The term "education records" is defined by FERPA to mean:

> those records, files, documents, and other materials which—

is the recipient of funds under any applicable program." 20 U.S.C. 1232g(a)(3).

[2] The educational institution must "maintain a record, kept with the education records of each student, which will indicate all individuals (other than [school officials]), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information." 20 U.S.C. 1232g(b)(4)(A).

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. 1232g(a)(4)(A). The statute excludes from its definition of "education records" several specific categories of records, including "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. 1232g(a)(4)(B)(i).[3]

[3] FERPA was enacted on August 21, 1974, as Section 513(a) of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 571, and became effective on November 19, 1974. 20 U.S.C. 1232g note. As initially enacted, FERPA did not use the term "education records" or contain a definition of that term. It instead used different terms to describe the materials that were subject to its various restrictions. Thus, it provided parents a right to inspect "any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns." 88 Stat. 572. It also provided parents with the right to challenge the accuracy of "their child's school records," 88 Stat. 572, and prohibited release, with

In addition to restricting release, without parental consent, of materials that constitute education records, FERPA requires that education records be made available to parents. FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children." 20 U.S.C. 1232g(a)(1)(A); see also 20 U.S.C. 1232g(a)(1)(B) (applying requirement to State educational agencies). Educational agencies and institutions also must provide parents an opportunity for a hearing "to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records." 20 U.S.C. 1232g(a)(2).

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out parental consent (except in limited circumstances), of "personally identifiable records or files." 88 Stat. 572.

Congress amended FERPA less than 45 days after its effective date and made the amendments "effective, and retroactive to, November 19, 1974." Pub. L. No. 93-568, § 2(a) and (b), 88 Stat. 1858-1862. One of the changes made by the amendments was to define the term "education records" and to insert that term in place of both the list of materials accessible to parents, and the description of the records the release of which is restricted. 88 Stat. 1859-1860.

b. Congress authorized the Secretary of Education to "take appropriate actions to enforce" FERPA and to "deal with violations," but specified that "action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with [FERPA], and he has determined that compliance cannot be secured by voluntary means." 20 U.S.C. 1232g(f); see also 20 U.S.C. 1234c. Congress also directed the Secretary to establish an office and a review board within the Department of Education for the purpose of investigating, processing, reviewing, and adjudicating violations of FERPA and complaints concerning alleged violations of the statute. 20 U.S.C. 1232g(g). Pursuant to that authority, the Secretary designated the Department's Family Policy Compliance Office (Compliance Office) to provide technical assistance to ensure compliance with the statute through voluntary means and to process complaints. 34 C.F.R. 99.60(a) and (b). The Secretary designated the Office of Administrative Law Judges as the review board. 34 C.F.R. 99.60(c).

As part of the technical assistance provided to ensure compliance with FERPA, the Compliance Office responds to inquiries from educational agencies and institutions about the statute. Pet. App. F2. In a letter dated July 15, 1993, the Director of the Compliance Office responded to an inquiry whether certain activities violate FERPA. That letter explained, *inter alia*, that "FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, 'maintained' by an educational

agency or institution at that point." *Id.* at F4-F5. The Director of the Compliance Office submitted a declaration in the instant case confirming that the July 15, 1993, letter correctly sets forth the longstanding position of the Department. *Id.* at F2-F3.

2. a. Respondent, Kristja Falvo, is the mother of three children who are enrolled in the petitioner school district, Owasso Independent School District No. I-011, in a suburb of Tulsa, Oklahoma. During the 1997-1998 and 1998-1999 school years, respondent objected to the practice of teachers in her children's classes having students grade one another's homework and tests while the teacher went over the correct answers in class and, after the students received back their own papers, having the students call out their grades to the teacher. Pet. App. A3, B2. Respondent complained about the practice to school counselors and to the school district superintendent, claiming that it "severely embarrassed her children by allowing other students to learn their grades." *Id.* at A3. Petitioners told respondent that her children had the option of reporting their grades to the teacher confidentially, but petitioners declined to prohibit the student grading of schoolwork. *Id.* at A3-A4.

In October 1998, respondent filed the instant action in the United States District Court for the Northern District of Oklahoma, under 42 U.S.C. 1983, seeking damages and declaratory and injunctive relief against petitioners, including the Owasso School District and various school and school district officials. Respondent alleged that the challenged grading practice violated FERPA and was unconstitutional under the Fourteenth Amendment. Pet. App. A4.

b. On April 26, 1999, the district court, ruling on cross-motions for summary judgment, entered judgment for petitioners. Pet. App. B1-B6.[4]

The district court held that allowing a student to grade the paper of another student and to have students call out their grades in class does not violate FERPA. Pet. App. B2-B4. The court relied (*id.* at B2-B3) on the Department of Education's interpretation of FERPA set forth in the July 15, 1993, letter of the Director of the Compliance Office (see *id.* at F3-F6), which explains that FERPA does not prohibit the practices at issue here because homework assignments and tests, as well as the grades assigned to them by other students in such circumstances, "would fall outside the FERPA definition of education records as they are not, strictly speaking, 'maintained' by an educational agency or institution at that point." *Id.* at F4-F5. The court noted that the Department of Education is the agency charged with enforcing FERPA, see 20 U.S.C. 1232g(f) and, as such, its interpretation of the statute "is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." Pet. App. B3 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)). The court rejected respondent's contention that the court should adopt the definition of "maintain" set forth in the Privacy Act of 1974, 5 U.S.C. 552a(a)(3), which includes

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[4] On October 16, 1998, in an order denying respondent's request for a temporary restraining order, the court stated that, for purposes of that motion, it was following the holdings of two other circuits that a plaintiff may bring a FERPA claim under 42 U.S.C. 1983. See Pet. App. C4 (citing *Fay* v. *South Colonie Century Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986); *Tarka* v. *Cunningham*, 917 F.2d 890 (5th Cir. 1990)).

any collection or use of the material.[5] The court emphasized that Congress did not choose to incorporate that special definition into FERPA. The court instead construed "maintain" in accordance with its ordinary meaning of "preserve" or "retain" and held that the Department of Education's interpretation of FERPA was reasonable in light of that construction and did not conflict with the expressed intent of Congress. Pet. App. B4.

The district court rejected respondent's constitutional claim as well, holding that a student's "interim tests and homework assignments" "are not 'highly personal' matters worthy of constitutional protection." Pet. App. B5. The court noted that, in any event, "students are given the option of having their grade related in confidence," "students do not grade 9-week exams," and "[n]o revelation is made of a letter grade on a report card or from a student's permanent transcript." *Ibid.*[6]

3. a. The court of appeals affirmed in part and reversed in part. Pet. App. A1-A32.[7] The court affirmed

[5] The Privacy Act provides that, for purposes of that statute, "the term 'maintain' includes maintain, collect, use, or disseminate." 5 U.S.C. 552a(a)(3).

[6] The court declined to rule on respondent's motion for class certification in light of its ruling on the merits. Pet. App. B6. The court also rejected the individual petitioners' argument that they were entitled to summary judgment based on qualified immunity because, in the court's view, the rights of privacy under FERPA and the Fourteenth Amendment were clearly established at the time of the alleged violations. *Ibid.*

[7] The panel filed its original opinion on July 31, 2000, but in the court's October 4, 2000, order denying rehearing and rehearing en banc, see pp. 11-13, *infra*, the court announced that the panel had determined, on its own motion, to amend its July 31 opinion. Pet. App. D2. The court therefore ordered the original opinion withdrawn and the amended opinion filed forthwith. *Ibid.* Our description of the court of appeals' opinion is of the opinion as amended and filed on October 4, 2000, which is reported at 229 F.3d 956 and reprinted in the appendix to the petition, Pet. App. A1-A32.

the grant of summary judgment in petitioners' favor on the constitutional claim, holding that "the school work and test grades of pre-secondary school students do not rise to the level of [the] constitutionally-protected category of information," *id.* at A6, because they do not constitute "highly personal or intimate" information, *id.* at A8 (internal quotation marks omitted).

The court of appeals reversed the judgment of the district court on the FERPA claim.[8] The court first concluded that the terms "education records" and "maintain" are "clear from the statute itself" and that deference therefore was not due the Department of Education's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Pet. App. A18-A19.[9] The court further held that, in any event, *Chevron* deference was not owed the agency interpretation at issue here because it was contained in an opinion letter issued by the administering agency. *Ibid.* (citing *Christensen* v. *Harris County*, 529 U.S. 576, 586-587 (2000)). The court recognized that such an interpretive letter is "'entitled

[8] The court affirmed the grant of summary judgment on the FERPA claim with regard to the individual petitioners to the extent respondent sought monetary relief. The court ruled that the individual petitioners were entitled to qualified immunity from liability for money damages because it was not clearly established that the challenged grading practice violated FERPA. Pet. App. A2-A3; A29-A32.

[9] As an initial matter, the court held that a violation of FERPA may be the basis for a suit under 42 U.S.C. 1983. Pet. App. A10-A16.

to respect' under * * * *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)," but the court found the letter and accompanying declaration to have minimal persuasive power under *Skidmore* because, in its view, they lacked sufficient reasoning, failed to take into account the breadth of the statutory language, and were stated in general terms that did not address the details of the practice at a particular school. *Id.* at A19-A20.

Turning to its own analysis of the statutory terms, then, the court of appeals first noted that there was no dispute that the grades placed on the papers by students and then reported to the teacher "contain information directly related to a student" and thereby satisfy the first element of the statutory definition of "education records." See 20 U.S.C. 1232g(a)(4)(A)(i). The only disagreement was over whether the grades placed by one student on the paper of another are "maintained * * * by a person acting for [an educational] agency or institution," for purposes of the second element of the definition. 20 U.S.C. 1232g(a)(4)(A)(ii). Pet. App. A21.

The court of appeals noted that at least some of the grades that are reported to the teacher are then recorded in the teacher's grade book. The court concluded that the grades become education records at least at that time because, in its view, a teacher's grade book and the grades it contains are "maintained * * * by a person acting for" an educational institution and therefore are "education records." Pet. App. A21-A24. The court then concluded that the grades are also "maintained * * * by a person acting for" the school, and therefore "education records," even at what the court characterized as "the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers." *Id.* at A24.

The court reasoned that when one student writes the grade of another student on the homework or test, the correcting student is a "person acting for [an educational] agency or institution." *Ibid.* (quoting 20 U.S.C. 1232g(a)(4)(A)(ii), court's alteration). And the court held that the student is "maintain[ing]" the grade, within the meaning of Section 1232g(a)(4)(A)(ii), by marking the homework or test paper, "because that student is preserving the grade until the time it is reported to the teacher for further use." *Ibid.*

Finally, the court rejected petitioners' argument that other provisions of FERPA demonstrate that Congress did not intend to include in the definition of "education records" the student grading of other students' work under the auspices of an individual teacher. Pet. App. A25-A26. Petitioners argued that a broad definition of "education records" is inconsistent with the statutory requirement that educational institutions provide a hearing to challenge education records, 20 U.S.C. 1232g(a)(2), and maintain a record of all persons who have requested or obtained access to a student's education records, 20 U.S.C. 1232g(b)(4)(A). But the court explained that "Congress could have sensibly intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers," Pet. App. A26, and that schools could continue the practice of having a central custodian keep records of who was granted access even though such papers remain under the individual teacher's classroom supervision.

b. On October 4, 2000, the court entered an order denying petitioners' petition for rehearing and suggestion for en banc review. Pet. App. D1-D6.

Four judges dissented from the denial of rehearing en banc. Pet. App. D2-D6. Those judges stated that

the grades recorded by students on the papers of other students, as well as the papers themselves, do not constitute "education records" within the meaning of FERPA because a student grading another student's paper is not acting for the educational institution within the meaning of Section 1232g(a)(4)(A)(ii). *Id.* at D3. The dissenting judges questioned how grades on individual student papers could be education records when, in their view, even a teacher's grade book is normally not an education record, except in limited circumstances. *Ibid.* Moreover, even if a teacher may act for the school in recording a grade in a grade book, they continued, "it is one step removed to say that the teacher's potential receipt of that grade makes every uncompensated student that participates in the grading process 'a person acting for such agency or institution.'" *Ibid.*

The judges dissenting from the denial of rehearing en banc also expressed the view that it "seem[s] impossible, if not implausible," that educational institutions must provide the right to a hearing to challenge each of the "thousands of grades a student might receive over time" and must maintain a record of access to each grade. Pet. App. D5. They cited the Joint Statement submitted by the Senators who sponsored the 1974 floor amendment containing the current definition of "education records." *Ibid.* (citing Joint Statement in Explanation of the Buckley/Pell Amendment, 120 Cong. Rec. 39,862-39,866 (1974)); see notes 3, *supra*, & 10, *infra*. The dissenting judges noted that the Joint Statement "drew a critical distinction between an institutional record in which a grade was recorded (the accuracy of which can be challenged) and the graded material itself (the accuracy of which cannot be challenged)," and they agreed with the Joint State-

ment's conclusion "that 'education records' referred only to the former." Pet. App. D5 (citing 120 Cong. Rec. at 39,862). Finally, the dissenting judges suggested that practical difficulties will result from the panel's ruling because it means that no student may learn the grade of another. *Id.* at D6.

DISCUSSION

The court of appeals' interpretation of the term "education records," as set forth in the Family Educational Rights and Privacy Act of 1974 (FERPA or Act), 20 U.S.C. 1232g(a)(4)(A), is contrary to the statutory text and framework and inconsistent with the interpretation of the Department of Education, which is the agency charged with administering and enforcing the statute. In our view, therefore, the court of appeals erred in concluding that FERPA prohibits students from grading the homework and tests of other students in the classroom.

Nonetheless, we believe that review by the Court is not warranted at this time. The question presented was a matter of first impression for the court of appeals in this case, and the question has not been addressed by any other court of appeals in the more than 25 years since FERPA was enacted. Thus, there is no circuit conflict. In addition, the court of appeals' analysis was based, in significant part, on the absence of formal guidance by the Department of Education and the brevity of the reasoning the Department had provided in support of its interpretation in the 1993 letter that was before the court. See Pet. App. A19-A20. In response to the court of appeals' decision, the Department has determined that it will issue regulations or other formal guidance setting forth a more detailed analysis of the meaning of "education records" under

FERPA and the application of that term and of FERPA not only to the particular practice at issue in this case, but also to a variety of other practices. For example, that process will afford the Department an opportunity to consider such matters as the teacher's own handling of students' homework, tests, and classroom work and the recognition of students' performance. The regulations or guidance should be of substantial assistance to school districts and teachers about a range of issues, and should also furnish the courts (including the Tenth Circuit) in any future cases a more complete presentation of the views of the agency charged by Congress with administering and enforcing the Act. In those circumstances, we believe that it would be premature for the Court to grant review in this case to consider the meaning of "education records" under FERPA.

1. a. When a student grades another student's homework or test as a teacher goes over the answers aloud in the classroom, the homework or test and the grade placed on the paper are not being "maintained" as records or documents by an educational institution, or by "a person acting for such agency or institution," within the meaning of FERPA, 20 U.S.C. 1232g(a)(4)(A)(ii). The ordinary meaning of the word "maintain" is "to keep in existence or continuance; preserve; retain." *Random House Dictionary of the English Language* 1160 (2d ed. 1987); see also *Webster's Third New International Dictionary* 1362 (1993) (maintain: "1: to keep in a state of repair, efficiency, or validity: preserve from failure or decline"). The grading student does not keep the paper or the grade. In this case, for example, each grading student apparently returned the graded paper immediately to the student who had written the paper. See Pet. App.

C2. Only after students received back their own papers, and were in a position to review the grading by the other student, were the students called upon to submit their grades to the teachers. *Ibid.*

The student's homework or test answers that have not been graded and are initially provided to another student, as well as the grade marked by the other student that has not been adopted by the teacher, are the work product of the students. Even if the grading student submitted the other student's paper or grade directly to the teacher, rather than handing it back to the student who produced the paper, the fact that the teacher may maintain the grade (or the student's paper) on behalf of the school, thereby making it an education record, does not mean that any grade or paper that *potentially* may be so maintained for the educational institution becomes an education record from its inception.

Reviewing fellow students' work can be a useful tool in the process of learning and critical thinking. The exchange of student papers for grading or other purposes is part of the on-going educational dynamic in the classroom among students and between students and teachers. And as the judges who dissented from the denial of rehearing en banc observed, the "teacher's potential receipt of that grade" does not make "every uncompensated student that participates in the grading process" a person acting for the school in connection with the maintenance of records. Pet. App. D3.

b. The court of appeals' contrary conclusion cannot be reconciled with the purposes underlying other provisions of FERPA. The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release without parental consent, but also that parents have a right to

inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert into such records a written explanation by the parents regarding the content of the records. 20 U.S.C. 1232g(a)(1)(A) and (a)(2). In addition, the school must maintain a record of all individuals, agencies, and organizations (other than the parent, eligible student and certain other authorized persons) that have requested or obtained access to a student's education records. 20 U.S.C. 1232g(b)(4)(A); 34 C.F.R. 99.32.

The court of appeals' interpretation raises questions concerning the application of those requirements to homework assignments, classroom exercises, and student evaluations and grading, and whether parents may be entitled to an opportunity to a hearing by school officials to present challenges concerning the accuracy of such materials and to insert the parent's own written explanation into the record. Imposing such an obligation on schools and teachers would constitute a dramatic departure from ordinary educational practices, and there is no indication that Congress intended that the enactment of FERPA, including its definition of "education records," would result in such a change. Rather, when Congress enacted the definition of "education records," the accompanying Joint Statement by the Senators who sponsored the legislation explicitly stated that the amendment was "not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution." 120 Cong. Rec. 39,862 (1974). The Joint Statement further noted that "[t]here has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's

performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given." *Ibid.*; see also *ibid.* (stating that hearing procedures must be adapted to different circumstances and noting that "[i]t is not the intent of the Amendment to burden schools with onerous hearing procedures").[10]

2. The Department of Education, as the agency charged with enforcing FERPA (see 20 U.S.C. 1232g(f) and (g), 1234c), interprets the statute not to prohibit students from grading other students' homework or tests in class because such papers and grades are not "maintained" by the school at that point and therefore are not "education records" within the meaning of the statute. Although the court of appeals' ruling is contrary to that longstanding and, in our view, reasonable administrative interpretation of FERPA, we believe that the Court should not review the issue at this time.

The Department of Education intends to issue regulations or other formal guidance regarding the meaning of "education records" and the application of FERPA to a range of practices concerning student papers and grading and the recognition of students' performance. The Department has received an inquiry

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[10] When Senator Buckley submitted the Joint Statement to the Senate, he explained that the amendments were intended to address certain ambiguities that had arisen from the language of FERPA as originally enacted, which itself had been offered as an amendment on the Senate floor and therefore had not been accompanied by traditional legislative history materials that would guide the agency in implementing the statute. 120 Cong. Rec. at 39,861-39,862. He stated that the Joint Statement therefore "provides a narrative and explanation of the meaning and intent of the various provisions of the amendment." *Id.* at 39,862.

from the National Education Association about the implications of the court of appeals' decision in this case, and the Department is responding by informing the Association about its intention to issue regulations or other formal guidance that will address the issues raised by the opinions in this case. The Department of Education disagrees, for example, with the suggestion in the dissent from denial of rehearing en banc in the court of appeals that the panel's ruling in this case renders invalid all school practices that may reveal students' grades. See Pet. App. D5-D6. Indeed, many such practices, including honor rolls and other awards received, are specifically allowed by FERPA. See 20 U.S.C. 1232g(a)(5)(B) (allowing publication of certain "directory information," after prior public notice of directory categories and opportunity for parents to prevent publication) and 20 U.S.C. 1232g(a)(5)(A) (defining "directory information" to include "awards received" by a student). In the past, the Department's Compliance Office has responded to questions from school officials regarding other such practices and has analyzed such practices individually, finding that some are valid under FERPA, whereas others are not. See, *e.g.*, Pet. App. F3-F6.

In any event, regardless of the questions raised by the opinions below about other school practices, the instant case presents only the narrow question of the validity under FERPA of the practice of students grading other students' homework and tests in class. Although the court of appeals discussed parental challenges to homework and test papers under FERPA, it did not definitively rule on the question concerning the circumstances or scope of any such right. See Pet. App. A26. Nor did the court decide whether having students call their grades out in class is allowed under FERPA.

See *id.* at A3 n.2, A21 n.10. Thus, the case does not present those issues or other questions that may arise regarding the treatment of students' papers and other work, in the classroom and elsewhere. For those reasons alone, this case is not a suitable vehicle for this Court to address the meaning and application of FERPA in a sufficiently broad context to furnish significant guidance to the lower courts and school administrators and teachers.

By contrast, the Department of Education is well situated to consider the meaning of "education records" and the application of FERPA in the context of a variety of common educational practices. As we have said, in response to the court of appeals' decision in this case, the Department intends to do so through the issuance of regulations or other formal guidance. We believe that such regulations or formal guidance will be of substantial benefit to the courts (including the Tenth Circuit) in any future case considering the validity of various practices under FERPA. Indeed, because the interpretation of FERPA by the agency charged with its enforcement is entitled to deference, the action the Department intends to take will have a bearing on the disposition of those legal issues by the courts. For these reasons, and because of the absence of a circuit conflict, we believe that review by the Court at this time is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS, et al.,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF OKLAHOMA EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS FOR WRIT OF CERTIORARI

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BRIEF FOR THE OKLAHOMA EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Oklahoma Education Association respectfully submits this brief *amicus curiae*, with the consent of both parties, pursuant to Sup. Ct. R. 37.2.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Oklahoma Education Association ("OEA") is a non-profit association that represents approximately 40,000 public school employees in the state of Oklahoma. Founded prior to statehood in 1889, the OEA represents all levels of education employees in the public school systems of the state of Oklahoma – school administrators, classroom teachers, and education support personnel. The OEA is a state affiliate of the 2.6 million member National Education Association. The OEA's primary focus is to organize around quality teaching and learning while continuing to advocate for and secure the rights and benefits of all public education employees in the state of Oklahoma.

Because the membership of the OEA, many of which are faculty members of the Petitioner School District, is directly impacted by the decision of the Tenth Circuit Court of Appeals interpreting certain portions of the

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[1] No counsel for any party authored this brief *amicus curiae*, either in whole or in part, and no persons other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Letters of consent of the parties are filed herewith.

Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), the OEA has a unique interest in the potential detrimental effect of this decision upon quality teaching and learning – the primary focus of the OEA in its mission to promote the cause of quality public education in Oklahoma. Accordingly, the OEA submits the perspective of its membership on the significance of this ruling and its impact on traditional pedagogical teaching and learning tools commonly utilized by educators in the state of Oklahoma and throughout the nation.

SUMMARY OF ARGUMENT

There exists no dispute that ensuring a free and appropriate public education for our nation's children has been a primary constant in the political landscape of the last decade. Inextricably intertwined in the current political debate of how best to ensure that ideal are a myriad of interests – political and otherwise – that often create conflicting responsibilities among the primary partners responsible for providing educational opportunities: parents, teachers, and state and local school officials. The enactment of state and federal legislation and judicial rulings that impact the education process – from how to handle blood borne pathogens to ensuring secular invocations prior to athletic events and all that lies in between – has created a legal complexity in public education that is unparalleled in its breadth, if not its scope. Caught squarely in the middle of this increasingly complex maze of state and federal laws and administrative regulations is the classroom teacher. Against this backdrop, the United States Court of Appeals for the Tenth

Circuit has decided an important question of federal law that suddenly has a significant impact on all educators and dramatically alters long-standing customs and practices which comprise the day-to-day operation of our public school systems.

The Tenth Circuit issued a decision involving the construction and interpretation of FERPA that struck down a common grading practice utilized by public school teachers in Oklahoma and which creates the potential for *individual liability* for perceived violations of FERPA in the future. The decision of the court of appeals has not only generated much confusion and uncertainty among public educators throughout the state of Oklahoma as it pertains to the legality of a traditional pedagogical practice, but also raises more questions and confusion regarding the applicability of FERPA to *other* traditional teaching and learning tools commonly utilized by public educators and whether such tools are also prohibited under the interpretation of this federal statute by the Tenth Circuit Court of Appeals.

Recognizing the privacy interests of both parents and students that are set forth in the articulated purpose of FERPA, *amicus curiae* urges review by this Court because this issue involves an important question of first impression under federal law. Since the importance of public education in our society is undisputed, the confusion generated by the decision of the Tenth Circuit among parents, educators, and students should not operate as an impediment to the educational process or otherwise disrupt the daily operations of local school districts in Oklahoma or throughout the nation.

ARGUMENT

The issue before the Tenth Circuit Court of Appeals was whether the practice of allowing a student to grade another student's homework, class work, or quizzes constitutes an impermissible disclosure of "educational records" under the Family Education Rights and Privacy Act. The facts were largely undisputed and the primary factual issue before the court of appeals was whether a traditional teaching practice was prohibited under FERPA – allowing classroom teachers to have students exchange papers for the purpose of correcting erroneous responses and providing an understanding of why a particular response was correct.

This common practice is utilized by many classroom teachers in Oklahoma and is viewed by many as a traditional teaching and learning tool because it allows students to receive immediate feedback on, and evaluation of, their daily work. From a practical perspective, this practice also allows teachers to be more efficient and productive in their day-to-day responsibilities of assessing progress through a student's daily work.

In rejecting this grading practice, the court of appeals concluded that "[B]ased purely on the language of the statute itself, . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA." *Falvo v. Owasso Independent School Dist. No. I-011*, 229 F.3d 956, 969-970 (10th Cir. 2000) (Footnote omitted). Four

judges dissented from the Court's order denying rehearing en banc and criticized the majority holding as an unwarranted expansion of the clear language of the statute which was unsupported by any legislative history. *Falvo*, 229 F.3d at 960.

The dissenting judges found quarrel with the majority definition of "education records" and argued that the Court's decision creates an implausible obligation of an educational institution under FERPA "to maintain an access record indicating those who have obtained or requested access to" the possible thousands of grades a particular student may accumulate over the course of her common education. *Falvo*, 229 F.3d at 961. The dissenting judges suggested that a careful reading of FERPA and its legislative history required a much narrower definition of "education records" than given by the majority and noted the "obvious difference, however, between grades entered in a grade book (a collective record of the teacher) and the individual grades (on student papers) that are not recorded in a grade book." *Falvo*, 229 F.3d at 960-961. *Amicus* OEA suggests that the interpretations of FERPA by the court of appeals fundamentally fail to both apprehend and correctly apply an "ordinary meaning" analysis of the relevant federal statutory scheme and ignore the appurtenant consequences of an alternative conclusion as suggested by the dissent in the decision presented for review.

I. THE COURT OF APPEALS' REJECTION OF THE LONG-STANDING INTERPRETATION OF FERPA BY THE FAMILY POLICY COMPLIANCE OFFICE OF THE DEPARTMENT OF EDUCATION IGNORES THE JUDICIAL RESPECT NORMALLY AFFORDED SUCH AGENCY OPINIONS

The traditional practice of allowing students to exchange papers for grading purposes had been recognized by the Family Policy Compliance Office ("FPCO") of the United States Department of Education as an acceptable practice under FERPA. FPCO is the federal agency charged with investigating, processing, and reviewing complaints and/or violations under FERPA. The FPCO is also charged with providing technical assistance to educational agencies or institutions in order to ensure FERPA compliance. In its defense of this action, the Petitioner School District relied, in part, on an advisory opinion letter issued by LeRoy S. Rooker, Director of the Family Police Compliance Office, which set forth an advisory opinion by FPCO that this traditional teaching practice did not violate FERPA.

The court of appeals decision specifically concluded that the "Rooker letter" had been afforded an undue degree of deference in the lower court proceeding and summarily concluded that the advisory opinion issued by FPCO was *not entitled* to the traditional doctrine of judicial deference afforded agency interpretations set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because "the meaning of the terms 'education records' and 'maintain' are clear from the statute itself, and a court can only defer to an

agency's interpretation if a statute is deemed ambiguous." *Falvo*, 229 F.3d at 969. Although the court of appeals acknowledged that an agency's opinion generally is "entitled to respect" under the rationale set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the court of appeals then promptly rejected the FPCO advisory opinion by suggesting that the "Rooker letter" did not contain a sufficient explanation of the agency's reasoning, failed to consider the "breadth of FERPA's language," and that the advisory opinion was based on a hypothetical consideration of the issue in the instant case as opposed to a specific factual scenario.[2] *Falvo*, 229 F.3d at 969.

The outright rejection by the court of appeals of the FPCO advisory opinion ignores the value that agency opinions often bring to our judicial system:

> But the Administrator's policies are made in pursuance of official duty, based upon a more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those

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[2] Notwithstanding the court's rejection of the Rooker letter as unpersuasive, the court relied upon the FPCO's statutory interpretation contained in the Rooker letter and subsequent declaration to suggest "that the right which we elucidate today was not clearly established" and then held that the individual defendants were entitled to qualified immunity in the lower court proceeding. Falvo, 229 F.3d at 974.

> for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in an adversary form does not mean that they are not entitled to respect. . . .
>
> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, *do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.* . . .
>
> *Skidmore v. Swift & Co.*, 323 U.S. at 139-40 (emphasis added).

Although the court of appeals in the instant case was not bound by the position set forth by the FPCO in its advisory opinion, when viewed in the totality of the circumstances, the policies of the FPCO should be given the respect described in *Skidmore* for several reasons.

First, regarding the court's view that the Rooker letter lacks sufficient reasoning and fails to consider the breadth of FERPA's language, the FPCO opinion interprets the key phrase "educational records" in a simple and straight-forward manner, based on a thoughtful, common sense, and flexible approach. In contrast to the FPCO's interpretive approach to FERPA, the court of appeals utilized a more legalistic approach in defining the term "educational records" contained in FERPA and prefaced its analysis with a disclaimer: "[S]hould our interpretation cause public discomfort or impose undesired burdens, it is to the source of the enactment, Congress, that those who are discomforted or burdened must turn for relief." *Falvo*, 229 F.3d at 1209. Notwithstanding

the disclaimer set forth by the court of appeals, the FPCO advisory opinion on the application of FERPA and the definition of "education records" appears intended to interpret this particular act of Congress in an objective manner and with the intent of producing the desired results for the public good. *See, generally, Skidmore*, 323 U.S. 134 (1944).

Second, regarding the view that the FPCO advisory opinion was based on merely a hypothetical consideration of the issue, the court of appeals ignores the identical factual setting contained in the Rooker letter and subsequent declaration. Apparently relying solely on a qualifying prefatory statement set forth in the advisory opinion, the court of appeals afforded no deference to the opinion's "general discussion" of FERPA as it applied to the *identical* issue presented in the instant case. Simply stated, the court of appeals' interpretation of FERPA and its expanded definition of the salient statutory provisions is in direct conflict with the long-standing position of the FPCO, as stated in the Rooker letter and subsequent declaration. The resulting conflict becomes problematic for those classroom teachers who do not happen to teach within the jurisdiction of the Tenth Circuit and seek interpretive guidance from the agency charged with providing technical assistance to educational agencies or institutions to ensure FERPA compliance.

II. THE COURT OF APPEALS' INTERPRETATION OF FERPA IS CONTRARY TO THE "ORDINARY MEANING" PRECEPT AND HAS CREATED CONFUSION AND UNCERTAINTY AMONG CLASSROOM TEACHERS AS TO WHAT ARE PERMISSIBLE TEACHING AND LEARNING TOOLS UNDER FERPA

In examining the clear language of the statute, FERPA defines "education records" as "those records, files, documents and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The phrase "and other materials" is instructive in interpreting the intent of Congress by defining "educational records" under FERPA. The common dictionary definition of "materials" suggests something of a physical nature. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 717 (10th ed. 1998). The Latin root of the word material is identical to that of the word "matter" and is defined as a "physical substance." *See id.* at 717. Applying an "ordinary meaning" analysis would suggest that an "educational record" is a tangible item consisting of records, files, documents, and materials. The specific list of materials that are included in the definition of "educational records" refers to the physical repositories of information, not to the information itself. If, as the court of appeals suggests, there exists no distinction between the term "records" and the term "information," then the definition set forth in the first descriptive subsection of FERPA, which states that educational records are materials that "contain information," is rendered superfluous

and one can make no distinction between the materials or the information itself in determining what properly constitutes an "educational record" under FERPA.

Notwithstanding the specific language deliberately chosen by Congress when enacting FERPA, the court of appeals extended the definition of "educational record" to include the scores students may give one another on daily papers pursuant to a traditional grading practice previously deemed in compliance with FERPA by the FPCO. In extending the common meaning of "educational record," the court of appeals stated that "[T]here is no dispute that the grades which students place on each other's papers and then report to the teacher 'contain information directly related to a student' and thus satisfy the first element of the statutory definition for 'educational record.' " *Falvo*, 229 F.3d at 970. This precise holding creates the confusion among classroom teachers concerning the extent and application of the court of appeals' decision as to what constitutes an "educational record" under FERPA.

A grade on an assignment or quiz is nothing more than one of many smaller components which are temporarily "contained" in a disposable grade book by a teacher. These smaller components may or may not be used to help determine a final grade, such as a semester grade. The final grade is the actual "educational record" which is "maintained" by the school district on the student's permanent transcript. If the court of appeals holds, as in the instant case, that one small component temporarily "contained" in a disposable grade book must be afforded protection, then the court must view all minor components which a teacher may or may not use to

derive a final grade as equally protected under FERPA. This would necessarily include other notes which are temporarily "contained" in a grade book, such as attendance records, a record of class participation, and impressions on behavior. Under this analysis, are teachers no longer allowed to ask if students are present, for fear that other students will know that a response or non-response may reveal a small part of a future grade? The sum of the component parts cannot logically exceed the sum of the whole. Accordingly, individual components which may or may not make up a final grade should not be afforded the same protection as the final grade under FERPA.

There clearly exists disagreement and confusion as to whether a "grade," under these circumstances, constitutes a record, file, document, or other material maintained by a school district. In the pedagogical context, a grade is an abstract bit of information reflecting the results of a homework assignment, quiz, or similar assessment. A classroom teacher is constantly assessing and monitoring the progress of pupils under their charge and is constantly re-teaching those individuals who, in the assessment of the classroom teacher, have not mastered the stated objective. In this context, a grade does not contain information as suggested by the court of appeals in its ruling – a grade is information reflecting assessment from the classroom teacher which may or may not be recorded and contained in a record, file, document, or other material maintained by a school district. The court of appeals interpretation of the term "educational record" is overly broad and has created significant uncertainty among classroom teachers who utilize effective teaching habits that require constant assessment and

monitoring of a student's progress in mastering the stated objective. Some measurement, either abstract or tangible, is necessary for the utilization of these effective teaching habits and to assist students in their mastery of a particular subject matter.

A common teaching and learning tool utilized by many pre-secondary classroom teachers is the concept of team learning wherein students are encouraged to "share with their neighbor" what they have mastered with regard to a particular learning objective and to assist fellow students in achieving the same mastery of the stated objective. Such cooperative learning models are traditional pedagogical tools commonly used by educators in Oklahoma and, under the overly broad interpretation of FERPA by the court of appeals, would necessarily involve disclosure of an "educational record" from one student to another when utilizing this common learning tool.

Another common example of a traditional pedagogical teaching and learning tool which may be impacted by the decision of the court of appeals is the practice of requiring oral recitation of a particular subject matter in specific academic disciplines. For instance, where a verbal presentation of a report on a particular literary work or a presentation illustrating the competing interests involved in a social or political issue is a curriculum requirement, do such presentations impermissibly disclose an "educational record" maintained by an educational agency or institution under FERPA? In a more familiar setting, one could certainly posit that the *Socratic* method of learning utilized in many advanced secondary school curricula – particularly where class participation

may have a positive or negative impact on a final grade – also constitutes a prohibitive practice under the court of appeals' holding.

These examples lead to the second subsection of the "education record" definition set forth in FERPA. FERPA requires that the records, files, documents, or other materials in question be *maintained* by the educational institution or an agent acting on behalf of the educational institution. In order to satisfy the disclosure prohibition, the district court below accorded the term "maintain" its ordinary definition of "preserve" or "retain." Similarly, the ordinary dictionary definition of "maintain" is "to keep in an existing state." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1998). The Latin root means "to hold in the hand." *See id.* at 702. Pursuant to an ordinary dictionary definition, to "maintain" an educational record would necessarily mean that those records, files, documents, and other materials are held and preserved in an *existing state* by an educational institution. In stark contrast to the "ordinary meaning" precept, the court of appeals determined that ordinary homework and routine quiz grades, as distinguished from the actual homework papers or quiz sheets, are educational records maintained by an educational institution because those grades *may be* eventually written in a teacher's grade book. Even where such grades are only utilized as teaching tools for use as a means of providing feedback to students, the court of appeals' decision seemingly deems such information an "educational record" protected by federal law; thereby creating the source of much of the confusion and uncertainty facing classroom teachers in light of this ruling.

Although one could argue that the court of appeals did not conclude that the actual homework papers or quizzes themselves constitute an educational record protected by FERPA, the logic of the court would be incongruous with that argument since the court of appeals held that the homework or quiz *score* given by one student to another is in itself an educational record maintained by a school district, regardless of whether such *score* is ultimately recorded in a teacher's grade book. The logic of the court of appeals in this interpretation is the notion that a particular homework or quiz score exhibits an identical character, both prior to and after it is recorded in a grade book. It is also clear that an undisclosed grade book maintained by a classroom teacher which contains *grades* or other tangible forms of assessing student progress, by definition, is not an "education record" under FERPA. 20 U.S.C. § 1232g(a)(4)(B)(i). The lack of either an abstract or tangible distinction on what constitutes an "educational record" under FERPA by the court of appeals necessarily requires the classroom teacher to seek interpretative guidance from FPCO on this issue.

The FPCO advisory opinion relied upon by the Petitioners in this case recognized the clear language of FERPA and attempted to delineate what constitutes an "educational record" that is "maintained" by an educational institution by giving practical effect to all portions of this federal statute. The policies and positions formulated by the agency charged with preserving the education privacy rights of parents and students are far more likely to reflect a reasoned and informed understanding of the practical aspects of the specific FERPA provisions that impact our nation's classrooms than the often narrow

and sterile view presented to a typical judge. *See, generally, Skidmore,* 323 U.S. at 139.

Since the court of appeals ruling in this case is binding authority only in the six states comprising the Tenth Circuit and since this issue is a question of first impression, the effect of the FPCO advisory opinion and subsequent declaration in this case on all other states not specifically included within the jurisdiction of the Tenth Circuit remains unclear. The issue of individual liability is of obvious personal concern to the classroom teacher and other school administrators. Although the individual defendants in the instant case were afforded the defense of qualified immunity from personal liability because of reliance upon the advisory opinion of the FPCO, putative plaintiffs in other jurisdictions will surely assert that the law is "clearly established" when alleging FERPA violations – technical or otherwise – even where classroom teachers and other school officials rely upon the FPCO advisory opinion and subsequent declaration in those jurisdictions not impacted by the Tenth Circuit decision in this case. Clear guidance on the legal parameters of what does and does not constitute an "education record" that is "maintained" by an educational institution under FERPA is necessary to resolve a question of significant importance not only to educators, but parents and students as well.

CONCLUSION

For the reasons set forth herein, *amicus curiae* Oklahoma Education Association respectfully suggests that this court issue the Writ prayed for by the Petitioners and address the issues set forth therein.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 23 2001
CLERK

No. 00-1073

In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal;

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN;

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

JOINT APPENDIX

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Order of the United States District Court for the Northern District of Oklahoma filed October 16, 1998 (ruling on Respondent's motion for temporary restraining order) .....Petition for Certiorari, Appendix C

Order of the United States District Court for the Northern District of Oklahoma filed April 26, 1999 (ruling on cross-motions for summary judgment) ..... Petition for Certiorari, Appendix B

Opinion of the United States Court of Appeals for the Tenth Circuit filed October 4, 2000 .....Petition for Certiorari, Appendix A

Order of the United States Court of Appeals for the Tenth Circuit filed October 4, 2000, denying petition for rehearing *en banc*, with dissenting opinion by Circuit Judge Kelly, joined by Circuit Judges Tacha, Baldock, and Brorby .....Petition for Certiorari, Appendix D

RELEVANT DOCKET ENTRIES

United States District Court
Northern District of Oklahoma

10/06/98	1	COMPLAINT (Summons issued); consent form sent (fee status: pd) [Date Entered: 10/07/98, By: jn]
		* * *
10/13/98	–	MINUTE ORDER: HRG set on Motion for TRO for 10:30 10/14/98 before Chief Judge Terry C. Kern (cc: all counsel) [Date Entered: 10/13/98, By: cs]
10/13/98	2	NOTICE AND COMBINED MOTION w/brf by plaintiff Kristja J. Falvo for temporary restraining order and for preliminary injunction (TRO/J) [Date Entered: 10/14/98, By: jn]
10/14/98	3	RESPONSE brf (in opposition) by defendants to pla's combined motion for temporary restraining order [2-1] and motion for preliminary injunction [2-2] [Date Entered: 10/14/98, By: jn]
10/14/98	–	MINUTES: TRO hearing held by Chief Judge Terry C. Kern; Pltfs to reply to Defts' response brief by 10/15/98 as to requirement under FERPA. Motion under advisement (TC-Rptr) [Date Entered 10/19/98, By: cs]
10/15/98	4	REPLY by plaintiff Kristja J. Falvo to dfdts' response to pla's motion for temporary restraining order [2-1] and preliminary injunction [2-2] [Date Entered: 10/16/98, By: sms]

10/15/98 5 SUPPLEMENTAL brf by school district defendants in opposition [3-1] to pla's combined motion for TRO and preliminary injunction [2-1], [2-2] [Date Entered: 10/16/98, By: sms]

10/15/98 6 APPENDIX by school district dfdts bo pla's combined motion for temporary restraining order and preliminary injunction [5-1] [Date Entered: 10/16/98, By: sms]

10/16/98 7 ORDER by Chief Judge Terry C. Kern denying pla's motion for temporary restraining order [2-1] and for preliminary injunction [2-2] (cc: all counsel) [Date Entered: 10/19/98, By: sms]

* * *

11/6/98 11 ANSWER and affirmative defenses by defendants Owasso Sch Dist I011, Dale Johnson, Lynn Johnson & Rick Thomas to complaint [1-1] [Date Entered: 11/9/98, By: sco]

* * *

12/16/98 – Transcript of TRO hrg before Chief Judge Terry C. Kern for 10/14/98 (C/R T. Copeland, 93 pgs.) [Date Entered: 12/17/98, By: lc]

* * *

02/03/99 16 MOTION by plaintiff Kristja J. Falvo for declaratory judgment, and for partial summary Judgment (C2J) [Date Entered: 02/03/99, By: sco]

02/03/99 17 BRIEF by plaintiff Kristja J. Falvo in support of motion for declaratory judgment

[16-1], of motion for partial summary judgment (C2J) [16-2] (oversized doc) [Date Entered: 02/03/99, By: cpo]

* * *

03/01/99 20 CROSS-MOTION by defendants for summary judgment [Date Entered: 03/02/99, By: sco]

03/01/99 21 RESPONSE (Combined Brief) by defendants to pltfs' motion for declaratory judgment [16-1] and partial summary judgment [16-2] . . . BRIEF by defendants in support of their cross-motion for summary judgment [20-1] [Date Entered: 03/02/99: sco]

* * *

03/29/99 24 REPLY by plaintiff Kristja J. Falvo to dfdts' response to pltf's motion for declaratory judgment [16-1] and partial summary judgment (CJ2) [16-2] [Date Entered: 03/30/99, By: sco]

04/12/99 25 REPLY by defendants to response to dfdts' cross-motion for summary judgment [20-1] [Date Entered: 04/13/99, By: sco]

* * *

04/26/99 27 ORDER by Chief Judge Terry C. Kern denying pltfs' motion for partial summary judgment [16-2]; granting dfdts' cross-motion for summary judgment [20-1]; and denying pltfs' motion for class certification [12-1] (cc: all counsel) [Date Entered: 04/27/99, By: sco]

04/26/99 28 JUDGMENT: by Chief Judge Terry C. Kern pursuant to order entered granting dfdts' motion for summary judgment [20-1]; jgm for dfdts Owasso Ind School, Dale Johnson, Lynn Johnson, Rick Thomas and Does 1-50 and against pltfs Kristja J. Falvo, Elizabeth Pletan, Philip Pletan & Erica Pletan (cc: all counsel) [Date Entered: 04/27/99, By: sco]

* * *

05/10/99 30 MOTION by plaintiff Kristja J. Falvo for reconsideration, and to clarify of Court's order & jgmt and brf in support [Date Entered: 05/11/99, By: lks]

05/25/99 31 RESPONSE by defendant Owasso Sch Dist I011, defendant Dale Johnson, defendant Lynn Johnson, defendant Rick Thomas to motion for reconsideration [30-1], to motion to clarify of Court's order & jgmt [30-2] [Date Entered: 05/25/99, By: lks]

05/27/99 32 REPLY by plaintiff Kristja J. Falvo to response to motion for reconsideration [30-1] [Date Entered: 05/27/99, By: lks]

06/02/99 33 ORDER by Chief Judge Terry C. Kern denying pltfs' motion for reconsideration [30-1] and clarification [30-2] (Entry Date 6/3/99) [Date Entered: 06/03/99, By: sco]

* * *

06/28/99 35 NOTICE OF APPEAL by p'aintiff Kristja J. Falvo from Dist. Court decision [33-1], 28-2] (cc: all counsel), fees pd, forms given, prelim roa faxed to 10th (Entry

Date, 6/28/99) [Date Entered: 06/28/99, By: am]

United States Court of Appeals for the Tenth Circuit

6/29/99 [1244892] Civil case docketed. Preliminary record filed. DATE RECEIVED: 6/28/99. Transcript order form due 7/9/99 for Terri Copeland pursuant to R.42.1. Docketing statement due 7/9/99 for Kristja J. Falvo. Notice of of appearances due 7/9/99 for Kristja J. Falvo and Owasso Sch Dist – I011. (as)

* * *

8/31/99 [1260975] Appellant's brief filed by Kristja J. Falvo. Original and 7 copies. c/s: y. Served on 8/30/99. Oral argument? y., Appendix filed. Original and 1 appendix copy. Appendix pages: 200.

Appellee/Respondent's brief due 10/4/99 for John Doe, for Rick Thomas, for Lynn Johnson, for Dale Johnson, for Owasso Sch Dist I011. (ccd)

* * *

10/18/99 [1272613] Appellee's brief filed by Owasso Sch Dist I011. Original and 7 copies. c/s: y. Served on 10/14/99 – Oral Argument? n. Appendix filed. Original and one appendix copy. Appendix pages: 335. Appellant's optional reply brief due 11/1/99 for Kristja J. Falvo. (as)

10/29/99 [1275553] Appellant's reply brief filed Kristja J. Falvo. Original and 7 copies. c/s: y (oac)

12/21/99	[1288261] Hearing set for March 2000 session, at Denver, Colorado. (sls)
3/6/00	[1306740] Case argued by attorneys Wilfred K. Wright for the appellant; Karen L. Long for the appellee, and submitted the Judges Lucero, McKay, Murphy. (hrs)
7/31/00	[1343464] Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part) and Remanded; Written, Signed, Published. Lucero; McKay, Murphy, authoring judge. [99-5130] (as)
	* * *
8/14/00	[1347287] Petition for rehearing en banc [99-5130]. filed by Owasso Sch Dist I011, Dale Johnson, Lynn Johnson, Rick Thomas, John Doe. submitted to panel. (bjv)
8/15/00	[1347608] Order filed by Judge(s) Lucero, McKay, Murphy – appellant's response to appellee's petition for rehearing en banc due 8/29/00 for Kristja J. Falvo. Parties served by mail. (bjv)
	* * *
8/29/00	[1351247] Appellant's response filed by Kristja J. Falvo [1347287] to the appellee's petition for rehearing en banc and submitted to court. Original and 14 copies. c/s: y. (as)
10/4/00	[1360503] Order filed by Judges Seymour, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Lucero, Murphy denying Petition for rehearing en banc. See published order of October 4, 2000 [1347287-1] (as)

10/4/00	[1360506] Published order filed by Judges Seymour, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Lucero and Murphy denying petition for rehearing en banc. A poll was requested. A majority of the active judges voted, however, to deny the request for en banc review. Judges Tacha, Baldock, Brorby and Kelly voted to grant the en banc suggestion. Although the rehearing is denied, the panel has determined that the July 31, 2000 opinion shall be amended. The original opinion is withdrawn and the amended opinion shall be filed forthwith. [99-5130] (as)
10/4/00	[1360511] Order filed by Judges Seymour, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Lucero, Murphy reopening appeal. See published order of 10/4/00. [99-5130] (as)
10/4/00	[1360512] Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part) and Remanded; Written, Signed, Published. Lucero; McKay; Murphy, authoring judge. (as)
	* * *
10/12/01	[1362460] Mandate issued. Mandate receipt due 11/13/00. (oac)
	* * *
1/8/01	[1383787] Petition for writ of certiorari filed on 1/2/01 by Owasso Sch Dist. I011, Dale Johnson, Lynn Johnson, Rick Thomas. Supreme Court Number 00-1073. (as)
6/29/01	[1427697] Supreme Court order dated 6/25/01 granting certiorari filed. (lg)

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, PLETAN, and ERICA PLETAN; and on behalf of all others similarly situated,	)	No. 98-CV-765-K
Plaintiffs,	)	
v.	)	
OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON OCTOBER 14, 1998

TRO Hearing

BEFORE THE HONORABLE
TERRY C. KERN, CHIEF JUDGE

APPEARANCES:

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* * *

[5] KRISTJA FALVO,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WRIGHT:

Q. Could you state your name for the record, please?

A. Kristja Falvo.

* * *

[9] Q. What were your children saying to you?

A. They were just telling me that – I would get their papers back, and they would have other students' names signed to them, and I would look at their papers to see if they were graded correctly, and I would ask why was this graded this particular way, and they would say, I don't know, so and so graded it, and so it's through discussion and talking to the children, also the meetings with the teachers.

Q. What harm, if any, are you concerned about that you've mentioned in your complaint filed with this Court?

A. I'm concerned about the fact that when people are requested to call out their grade, or even requested to – or even given the opportunity to take their grade up privately, the other students have awareness of that grade, and because [10] they do have awareness, they are singled out, and they can be picked on. They can have their test papers graded incorrectly.

Q. Ma'am, do you have any personal knowledge of any specific circumstances with regard to this and your children involved in this matter?

A. Yes, from what they have told me.

Q. Could you explain to the Court?

A. I have personal knowledge of tests that I have – well, do you want me to explain every child? I have three children.

Q. Start with one child at a time, ma'am.

A. Okay. Elizabeth, my oldest, is in eighth grade, and her concern has been the fact that there's a student in her class who doesn't like her, has made it very clear that he doesn't like her, and so he takes the opportunity to grade papers incorrectly and puts her on the spot.

She is required then to either go to the teacher, and, in her words, they tattle on the student, which she doesn't want to do because of peer pressure, and just accept the grade. She's in honors classes, and so the issue of calling out a good grade hasn't been a problem for her, but this has been another problem.

Philip is in seventh grade, and it's – I was – it has come to more of my attention with him, because he wants to be like every other student. Every student calls out their grade. He wants to be like every other student, so he calls [11] out his grade. Subsequently, many of his grades are low percentages, and at that time, then he's labeled stupid by students, and he's called names, and his – he feels bad about himself, and it's hard for him to go to school and learn because of that.

My daughter, Erica, who is in sixth grade is in honors classes. She's very concerned with right and wrong, and she's been asked on occasion by another student to change the grade.

In one case, a student got a 55 and the student asked her if she could change it to a 75, and she was torn, because she didn't know if she should keep it at 55 or

change it to a 75 for her friend. And so she was torn with making a decision like that.

* * *

[15] Do your children including Philip, Erica, and Elizabeth have one teacher all day long or do they have several teachers?

A. They have several teachers. They go from classroom to classroom.

Q. This practice that you're talking about, the exchange of papers, is this prevalent among all the teachers, or are there some teachers –

A. No, sir. There are some teachers that grade their own papers, and there are some teachers that have the children exchange papers. There are some teachers that have them only exchange maybe daily work. It's nothing that's concrete. It's from a teacher-to-teacher situation. It depends on how the teacher wants to run her classroom.

Q. In your belief, is it up to the teacher to decide how the papers are to be graded, if they're to be exchanged?

A. Yes, sir. That's my belief.

Q. You have a fourth child. What is the name of that fourth child?

A. Andrew.

Q. Andrew isn't mentioned in the lawsuit. Could you explain to the Court why that is?

A. He goes to an elementary school where there is – where the principal does speak to the teachers prior to class, at the beginning of the school year, and instills a rule that the [16] teachers will not have the students exchange papers. They can either grade their own paper, or the students will grade their paper.

Q. When you presented to the assistant superintendent and the superintendent your concerns, did you provide to them any solution to the problem?

A. My suggestion was to have the students grade their own papers. I believe that the student would then get immediate feedback on the answers they did wrong, and that that way my goal, along with all the teachers' goals is education and learning, and I just suggested that if it's too time consuming to grade papers, have the student grade their own paper. If they can, they could see what they did wrong, they could write in the right answer, they could use a red marking pen, or whatever they needed to do, and then they would learn that answer. And I would think that the goal would be to learn it, and so I was hoping for the educational outcome to be better that way.

* * *

[17] Q. (By Mr. Wright) Ms. Falvo, do you have an opinion or a belief as to whether the test results that your children take on a weekly and daily basis, if it is your belief that those would be considered or construed to be educational records?

A. I believe they would be. I would believe that if a teacher calls their grade out, and they put it in a grade

book, that that's part of my child's educational record. It goes into an average of their grades.

Q. Is that attached to a name?

A. Yes, sir. It's attached to their names. To – it's attached. They would get a grade average. It would be like Philip Pletan, and they call out the grade. It goes under the grade book under Philip Pletan. At the end of nine weeks at the end of the semester, I think that those grades would be averaged, although teachers have said, well, some grades go in the grade book and some don't.

I don't know which ones do, and I don't know if there's a way, unless you're in the classroom and watching the [18] grade book, if you can actually keep a record of which ones do and which ones don't. And so I don't have any guarantee that any grade or any average goes into the grade book. But I believe any grade that is called out has a potential to go into my son's, child's, my daughter's educational record.

* * *

CROSS-EXAMINATION

[19] BY MS. LONG:

Q. Good morning, Ms. Falvo. I want to ask you just a few questions regarding the testimony that you've given to the Court. First of all, this issue of whether this is an education record or not, I believe you mentioned that you don't know what ends up in the education record. Do the students who participate in grading other student's papers know what becomes a part of the education record or what doesn't become a part of that record?

A. The question is, is any grade that's called out, does any student know? Does any teacher know? It's up to the discretion of the teacher, and unless you have someone in that classroom knowing exactly what the teacher's writing down, the only person that would know would be the teacher. However, because so many grades are called out, and this is daily grades, this is test papers, it would be hard for me to believe that although my son calls out his grades, none of those papers, none of those grades would be a matter of educational record.

* * *

[20] Q. Isn't it the case that the most the students do is participate in perhaps the grading of daily work when that occurs under the direction of the teacher?

A. Well, there's no guideline, so it might be daily work for one teacher, it might be a major test. And I do have knowledge from my older daughter that they do exchange major test papers and exchange them and call them out in the eighth grade. So I would assume from that knowledge that that would go into the educational record if it's a major test.

Q. You're familiar with your receipt for Philip, for Elizabeth, for Erica of nine-week grade reports?

A. Yes.

Q. And you don't have any knowledge, do you, of the [21] individual grades for purposes of those nine-week grade reports being calculated by students in the class?

A. They're not calculated, they're called out by students in the class.

Q. But isn't it true that the grades that are called out are those grades on individual papers? Those students are not, are they, taking the accumulation of grades and compiling those for purposes of coming up with nine-week grade reports?

A. I would think that if you believe that a student is knowledgeable enough to grade a paper, and you always grade that person's paper behind you, and they always get a 50 or a 56, then I would assume that a student would assume that that person is going to get an F in their nine-week report, but that's just my assumption.

* * *

[23] THE COURT: Let me ask a question: Is there any pattern? Is it more prevalent in math classes; is it more prevalent in English classes?

THE WITNESS: I don't believe there's any pattern. It happens in English class; it happens in social studies classes; it happens in civics classes.

THE COURT: All right.

* * *

[24] Let me finish, please. At that time, she was embarrassed. She had to leave the class, because she was in tears. The next day I suggested she talk to the teacher and see if she could grade her own paper, a solution that I had requested. And she did speak to that teacher, and asked if she could grade her own paper. And after the teacher talked to her a little bit and asked our names, then she was granted that wish, but – on an individual basis from that teacher. However, she still feels pressure, because she's different from all the other kids now, and

so she's being pressured. She feels herself being pressured into letting the exchange go on again.

Q. As to Elizabeth, as to Erica, or as to Philip, was it your understanding that it's the same student who grades the student's paper in all instances?

A. What happens is it depends on the – each teacher has [25] their discretion. They can say exchange it with a neighbor, with a friend, so it depends on the seating assignment of the students.

Now, that seating assignment, again, is up to the discretion of the teacher. It can change every semester; it can change every nine weeks; it can change every two weeks, so there's no guarantee. There's no guideline as to who would be grading that paper.

Again, I believe sometimes when you have a student grade someone else's paper, it can be more time consuming because the student doesn't have a judgment.

One of my children, Philip, in particular, he had – he writes slower than the other students and didn't get the notes down like he was supposed to. And one of the worksheets he had needed definitions. And I help my children with their homework. We looked up the definitions in the back of the book, because they weren't in his notes.

Now, the definition, of course, was longer and more detailed than what the teacher had lectured. He wrote the definition that was in the back of the book. That student marked off his definitions, because they were not what the teacher had said they were. I believe that that student didn't have the judgment to differentiate between the

definition in the book and the abbreviated definition the teacher gave.

Now, my son, because I have talked to him a lot, went [26] up to the teacher and said, can you look at this? I think this is wrong. And the teacher did correct that. But I know that some students, and I can attest to that from speaking to other students, this is not – that they're afraid. They don't want to go up and say – and I think as a parent, if you're a parent, you know that sometimes children are afraid to go up, or they're just apprehensive to go up and say something was graded wrong.

Q. But do I understand that as to Philip, he went up and in that instance, he got it corrected?

A. Only because I'm encouraging him through this past year to go up. Only because I'm aware of the practice, and that I have been role-playing with him. My husband has been role playing with him, and we have been working, because of this issue, on a daily basis on how to handle situations like that. And I believe that I – if I had not role-played, if I had not encouraged him in the past to do this, he would accepted that.

* * *

[27] It doesn't bother me. I get hundred percents. But she told me that there is a student who grades her paper wrong on purpose. She knows of other students that do that, because they don't like them.

Q. Now, is it your understanding that every student who gets back a paper that's been graded by another student has the right to bring, much like Philip did, to the

attention of the teacher that they believe the student grading their paper did so improperly or inaccurately?

A. I understand that the student does have that right, and I believe the teachers would certainly embrace that right. What I am saying is, is many students – we're asking them to act as adults instead of sixth, seventh, and eighth graders. And if we get in the minds of sixth, seventh, and eighth graders, a lot of them don't have the self-confidence. A lot of them are too concerned with peer pressure to go up and question a paper, or they might look at it, and if the person grading the paper cannot differentiate between what a right answer and a wrong anger [sic] is, as an example would be that definition that was longer than the teacher's, I can only assume that there might be a student who cannot tell if that question was actually correct, and so they can assume that they got it wrong.

Q. Have you ever felt it necessary to convene a meeting of Elizabeth's teachers, whether last year or this year, to challenge the grading procedure used by her individual [28] teachers?

A. I have never spoken to Elizabeth's teachers about the grading system.

Q. How about Erica's teachers?

A. No, I let her talk to her English teacher, and I knew she was going into the Sixth Grade Center where that issue had already brought up – had already been brought up.

Q. And as I understood it, that matter was successfully resolved between Erica and her teacher; is that correct?

A. On that particular instance, but there's still a struggle that she goes through daily because she wants to be like the other children.

Q. And is this the struggle that you refer to as a consequence of her request and the granting of that request to grade her own paper?

A. Yes.

* * *

[29] The concern here is the reason parents – you might ask why other parents haven't complained. There is a stigma when you do go to school and complain to the teacher. You want your children to be liked. You want the teacher to like your child, and whether you want to admit it or not, there is – it comes down to the basic – you don't want to ruffle anyone's feathers because these children are there in school, and you don't want to make anyone angry.

And so a lot of parents have said, I don't want to – I don't want the teacher mad at my child, because they might not be given the benefit of the doubt next time. And so, no, I did not go to each teacher. I did not go to each principal with my complaint. I went to the administration, hoping that a [30] guideline could be administered to the whole school district so that every student would be given the same protection that I wanted my children to have.

Q. Have your children been retaliated at all against because of your complaints to the administration regarding the use of student-to-student grading?

A. Retaliated by who?

Q. By teachers.

A. By teachers?

Q. Yes.

A. Again, I was asked that by the news media, if I was afraid that the teachers would retaliate against my children, and my feeling was, I have respect for teachers. I believe that they are professionals. I have nothing against the teachers. I have something against the grading policy.

Q. Is it true that what you hope to achieve is not just a remedy in a particular instance involving Elizabeth or Eric [sic] or Philip, but what you want to achieve is that the Owasso School District cannot use students to grade papers under any circumstances?

A. My goal, as I requested, was to have the Owasso School District make a guideline where the student would grade their own paper, or the teacher grade the paper. The teacher brings the papers up and writes the grade down in the grade book in private. That was what my goal was.

[31] I have no problem with a student grading their own paper. I believe that that would be used as a learning tool. I believe that when you have another student exchange papers and someone else grades it, they might get that paper back sooner, but I can guarantee you, if you get a bad paper, if you get a 47 percent, at least in my personal experience, I am not the one that would go and look at my paper and say, gee, what did I get wrong? I would take that paper, and I would put it in my backpack, because seeing red marks all the way down my

paper would be too painful for me to look at. I would have to look at it later on for a test.

Q. Ms. Falvo, isn't it true that when you originally brought this complaint when Philip was in the Sixth Grade Center last year, that the school was most willing to ensure that Philip knew that he could privately report his grade?

A. The teachers would tell me that if Philip wants to, he can come up and report his grade. They did not say – but another student – here's what would happen, and this is what happens. Another student knows the answer, knows what he got, you're embarrassed because the only students that go up and report their grade, at least is what I've been told, the majority – I can't say only, because I don't believe in whole numbers, but the majority of students that go up and report their grade in private are the ones that are too embarrassed to call their grades out. So everyone already knows that they've gotten a [32] poor grade.

Also, you have a student sensing what he'd get. And I believe this is information I have been told by my students. Then they're all curious as to what they got. My daughter one time took a paper up, and this was only a 74 percent. She took a paper up to the teacher to have it submitted in private, and that was the whisper around her desk, what did she get, what did you get, Erica? It brought more curiosity.

And the point is, if grades – if students believe the grades are private, and the teacher keeps them private, then this curiosity of who got the bad grade would be eliminated also.

Q. Did Philip use the process that was available to him to confidentially report his grade?

A. Sometimes, sometimes he would.

Q. Are you aware of the practice that students are sometimes even looking over each other's shoulders to see what another student is getting?

A. Well, I think all students are very curious, because we make such an emphasis on grades. –

* * *

[43] Q. Do I understand correctly that the guideline, in fact, the only guideline that is acceptable to you is that teachers be prohibited from using students to grade daily papers?

A. Again, my guideline is to have their students grade their own papers on daily work. My guideline is to have those papers, grades be collected by the teachers so that they can record the paper, the grades in private instead of calling them out loud.

* * *

[47] Q. I have just one final question for you. Isn't it the case that with your three children, Elizabeth, with Erica, with Philip, in every instance where there have been student-to-student grading, your children have had the option, whether they exercised it or not, to privately report that grade to the teacher?

A. I would say that when my students first started, Philip first started the sixth grade, he didn't understand that he had that option. And it wasn't until several meetings afterwards that I understood he had that option. So I

had not – true, I cannot state for a fact that the teacher says if you don't want to call your grade out – I have no control over the fact of any teacher if they say do you want to call your grade out or bring it up. I cannot say that I was in that classroom.

What I can say is that when it was brought up, they were giving me that option. However, I cannot – my goal is for all students, not just mine. I just happen to be the type of person who talks and asks questions. I don't think every student has sometimes the ability. Again, I'm speaking for a lot of students. I'm for everybody in this. And if you don't know, if you – is there a guideline? Is there a guideline in [48] this school that says the teacher on the first day says you can call your grade out or you can bring your paper up? Is there a guideline that states that? I've never seen that. So I can't say that my child was given that opportunity. I can say that once we brought it up, the teacher said, well, he can do this.

Q. Well, certainly, by the end, or when you first brought it up in the sixth grade, that was made clear, right?

A. That's correct, but it's not good enough. I am – I don't want good enough. Okay, I want –

Q. Thank you.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. WRIGHT:

Q. Ms. Falvo, if you could finish your comment, please.

A. My situation is, I feel it is not – having no guidelines is a situation where it's not good enough. It's a situation where, if teachers are given particular guidelines, then there is some accountability, and the children, all children, will know what their rights are in the classroom then.

Q. You testified that your children have been harmed by this whole process; is that correct?

A. Yes, sir.

* * *

[49] Q. To the best of your knowledge, this grading practice of calling out the grades in class still exists at Owasso Public Schools?

A. Yes. I asked my children last night, and they said, yes, it does.

Q. In the Sixth Grade Center?

A. Yes.

Q. In the Seventh Grade Center?

A. Yes, sir.

Q. In the Eighth Grade Center?

A. Yes.

* * *

[51] RICK THOMAS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WRIGHT:

Q. Would you state your name for the record, please?

A. Rick Thomas.

* * *

Q. Where are you employed?

A. Owasso Public Schools.

Q. And what is the scope of your employment at Owasso Public Schools?

A. I'm the principal at the Sixth Grade Center.

* * *

[53] Q. The grading practices of students exchanging papers at the Sixth Grade Center, does that occur?

A. Yes, sir.

Q. Do those students in those classrooms call out their grades?

A. Some students do call out their grades. Some students do bring them up to the front. It depends on the classroom. It depends on the teacher.

Q. So you as a principal do not have an overcall guideline for the teachers?

A. No, we don't. I feel like the teachers, their classroom – it's their classroom. They are professionals, and we allow them to make the rules in their classroom, as long as they follow certain guidelines by the school.

[54] Q. What are those guidelines?

A. As far as concerning the rules and stuff?

Q. You just mentioned the guidelines.

A. The guidelines of the school would be to not infringe upon anybody's right to privacy, which we give them the – that's why we give them the option. We do not make them come up to the front – or to say their grade out loud. We give them the option of going up and giving it to the teacher.

The rules, as far as rules in the classroom, each teacher sets their own rules. Obviously, you know, there's certain rules that are followed by the school. You know, you have five minutes in between class and those rules there, but that doesn't really have anything to do with what we're talking about here.

* * *

[59] CROSS-EXAMINATION

BY MS. LONG:

Q. I have just a few questions for you, Mr. Thomas. First of all, you heard the testimony earlier of Mrs. Falvo regarding some incident where her child, Philip, was ridiculed. Do you require – or do you recall any discussion related to any incident brought to your attention where there was some harm to Philip?

A. Only thing I remember is discussing basically the Sixth [60] Grade Center in general, children at this age, the things that would transact, the things that would go on in the hallway. There's only two specific things that I know of that I even had, you know, knowledge of that I had written down. One of them involving a bus incident with a young lady, and the other involving a notebook in a PE class.

* * *

[61] Q. Would you tell us, please, why do teachers elect to use, [62] on occasion, students to grade other students papers at all?

A. Well, I think there's several reasons as teachers that they do. I think the first reason, it would be so that they can get immediate feedback on that lesson. If I'm grading a paper in class, after I've graded the paper, through discussion of the right answer, wrong answer, as a teacher, I could enforce those answers to reinforce those answers.

They also do it to keep that person from changing their own answers or also sometimes if I'm grading my own paper, I won't notice things that I would notice on somebody else's paper.

Q. Is there any reason why teachers would not favor having students grade their own papers?

A. I guess the obvious reason would be if there were mistakes made, you know, which anybody would make – could make mistakes on them.

Q. Did any teachers report to you when the Falvos first indicated their opposition to the student-to-student grading that they had noticed Philip's experience of self-esteem problems or related problems connected with grading?

A. No. Actually, they reported just the opposite.

Q. How would you describe Philip's academic performance when he was in the sixth grade?

A. Philip was a – based on grades, he was a – you know, he had a few As, Bs, and a C. You know, that was the last part of [63] the school year. He was an average student. Worked hard. I think he worked hard to be an average student, but we have students who work hard to get to that point. I guess that pretty much answers that.

Q. How long have you been a principal with Owasso Schools?

A. I've been a principal two years; assistant principal for two years.

Q. And how long have you been associated with the Sixth Grade Center?

A. Sixth Grade Center, two years.

Q. Have you ever had any parent, other than the parent here today, report opposition to your student-to-student grading as it's been described today?

A. No, ma'am.

* * *

[63] REDIRECT EXAMINATION

* * *

[64] Q. (By Mr. Wright) You testified earlier that this opens the door for cheating if the students grades their open [sic] papers; is that correct?

A. Yes, it could, yes.

Q. Does it also open the door for cheating if another student grades another student's paper?

A. We would hope not.

Q. That wasn't the question. Does it open an opportunity for [65] another student grading another's paper to cheat?

A. If a student chooses, yes, I mean, they would have that opportunity at any time, if the student chooses to do so, yes.

Q. So the opportunity is there?

A. Yes.

Q. It is present?

A. (Witness nods head.)

Q. Do you ever have a problem with the teachers grading their own papers?

A. With the teachers grading their own papers?

Q. Yes.

A. Grading the students' papers?

Q. Yes.

A. Teachers make mistakes, too, yes. Is that – I mean, am I understanding –

Q. Do the teachers not have a problem with grading their own papers?

A. Do the teachers have a problem grading the students' papers?

Q. That's correct.

A. There could be problems, yes.

Q. What are those problems?

A. If I'm wanting immediate feedback from those papers, as a teacher, if I have 140 students and time doesn't permit me to grade those papers within that day, then I don't get immediate [66] feedback from that lesson. If I grade them two days later and hand the papers back two days later, and I've gone on to other lessons, I haven't got immediate feedback, so that would be the problem with teachers grading the papers that way, yes.

Q. Mr. Thomas, is there a distinction between immediate feedback when another child grades another's papers and when a child grades his own paper?

A. Be the same feedback.

Q. Be the same feedback; would it not?

A. Uh-huh.

* * *

[71] BY THE COURT:

Q. You indicated that you had communicated to the teachers the fact that students could come up and give their grades privately?

A. Yes, sir.

Q. When was this first communicated to the teachers?

A. I communicated that with the teachers at the first of the school year when we were going over just classroom procedures and things like that.

Q. First of which school year?

A. The first of last school year. I do it every year, at the beginning of the year in the teacher orientation.

Q. Do you know whether or not this is a practice of the school system? Is this done in every grade?

A. To my knowledge, I mean, I don't personally know. I would just assume that it is, because we talk about the right to privacy act and all that, and we discuss that in our principals' meetings. I can't say whether each principal goes back and does that, no.

Q. You've been either a principal or an assistant principal for four years?

A. Yes, sir.

[72] Q. And has this been discussed in your principals' meetings every year since you've been –

A. Yes, sir. As of –

Q. – an assistant?

A. Yes.

* * *

[73] Q. So in other grades, it could be that no mention is even made of whether or not students should be asked to give their grades out loud?

A. Yes.

* * *

[74] Q. And there seems to be – I haven't heard any differentiation between which tests the students are allowed to [75] grade, whether it be daily work, pop quizzes, chapter tests or nine-week tests. That all depends on the individual instructor?

A. Students do not grade nine weeks tests or semester tests.

Q. Is that a written guideline?

A. It's not written. It's told – I mean, as far as in writing, no, there's not.

Q. But it's understood, or at least you tell all of the teachers –

A. Yes.

Q. – that you direct that the students are not to grade nine-week tests?

A. Nine-week tests or semester tests.

Q. Or semester tests?

A. Teachers take those up, and they grade them.

Q. Thank you.

* * *

[76] BOBBY JOE COKE,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LONG:

Q. Mr. Coke, if you would state your full name for purposes of the record being made in this matter.

A. My name is Bobby Joe Coke.

Q. And –

THE COURT: Spell that last name, please.

A. C-O-K-E.

Q. (By Ms. Long) Are you employed, sir?

A. Yes, ma'am, I am.

Q. And who's your employer?

A. Owasso Public Schools.

Q. And how long have you been employed by Owasso Public Schools?

A. Twenty-four years.

Q. And what is your current position?

[77] A. I'm a principal of the Seventh Grade Center in Owasso.

* * *

[78] Q. You, I assume, heard the testimony of your colleague at the Sixth Grade Center, Mr. Thomas. Do you have anything to add to the reasons why teachers might use the student-to-student grading practice in their classrooms?

A. First of all, I agree with him, it gives immediate feedback. And with the number of students we have at

the [79] seventh grade, for instance, I have some teachers that have 140 students in a classroom, which I will admit is too many, but it would be virtually impossible for them to grade those papers, particularly in certain classes like math.

I mean, they're going to have a paper in there every single day. But grading those papers gives the student – he does his homework, he brings it to class, it's going to be graded, it's going to get immediate feedback. He knows how he did that day when he brings it back.

Q. What is the practice at the Seventh Grade Center with respect to calling out of grades following their grading?

A. I don't think there's any teacher there that's going to require a student to call out a grade. I believe that most of them will give the student the option to bring their grade to the front and report it, give it to the teacher so she can record it.

* * *

[80] Q. Did Philip, in all of his classes, have the option of privately reporting those grades?

A. Best of my knowledge, yes.

Q. And is it the case that a student is stigmatized, in your opinion, by walking up and confidentially reporting his grade to a teacher?

[81] A. No. I don't think they're stigmatized. I mean, there would be a lot of students that make good grades that bring them up simply because they want praise from their teacher.

* * *

Q. The practice that is utilized by teachers involving using students as grading, or as graders, would teachers or Owasso Schools suffer by having that practice eliminated?

A. Well, would the schools or the students suffer?

Q. Well, the students or the teachers.

A. I think if you did away with it, the students would suffer, simply because you're not going to cover as much [82] material as fast as you could if the students grade those papers, and you want to cover as much material as you can.

I think that's our job to do the best job and cover as much material in each class and be as efficient as we can. I think that's part of education.

* * *

[83] CROSS-EXAMINATION

BY MR. WRIGHT:

Q. Sir, you testified that you're aware of the facts of this case; is that correct?

A. I'm aware of some of the facts, yes.

* * *

[84] Q. You also talked about this practice of students grading others papers, and how it would in some way, shape, or form initiate a rapid coverage of material throughout the day; is that correct?

A. If we didn't do it, I don't think we would cover as much material in the classroom.

Q. Can you accomplish that same goal by the students grading their own paper?

A. You could probably accomplish the same goal, but you've got to keep in mind, I do not believe that students will honestly grade their own paper. Some will, but I would say, over a period of time they're going to realize that they – they won't do that.

Q. If they grade their own paper, do they hand it back to the teacher?

A. In most cases, yes, they are going to, as they do now when other students grade it. There's a lot of teachers that will take the paper after they grade it, they exchange it with students, they give it back to the student. This happens in most of the classrooms. They review those papers while the student has his own paper in his hands. They go over that. It's a learning process. They go over the paper, and this is [85] the problem, they can correct it when wrong.

If it is graded incorrectly, you write up to the top of the paper, this is the way I personally did it, and I have some teachers that do it this way, they write at the top, please, teacher, check number 14, I think it's right, before you record it. Sometimes they pass the papers up and give it to the teacher, she records it. That happens that way. Sometimes they are verbally given out, the scores.

Q. Your concern was to – this process of exchanging papers would somehow pick up the pace of the material that could be covered; is that correct?

A. I will say yes. You can get immediate feedback by grading those papers.

Q. Other students grading others papers?

A. That's true, because they're going to get their paper back very efficiently, very rapidly with a score or with the number right on it, or whatever.

Q. Which is faster, exchange – having students exchange papers, or just immediately having that student grade that one paper?

A. There probably wouldn't be much difference in time.

* * *

[86] Q. Do you have any teachers that grade the students' papers themselves, where the teacher is actually grading the paper?

A. Sure.

[87] Q. Okay.

A. Partially. They would try to grade most of them. Some of them grade most of them, yes.

Q. This exchange of papers, does it provide an opportunity for the other students to cheat?

A. There's always an opportunity for a student to cheat. If it's a homework assignment, they take it home. Mom could do it, dad could do it; they could get a girlfriend to do it. There's always opportunity to cheat.

Q. So what you're saying, either or, whether the student grades his own paper or whether they exchange the paper, the opportunity to cheat is there?

A. It is there, but I would think if the student grades his own paper, the opportunity would be greater.

Q. Okay. Thank you. You've testified that students would suffer because they're not covering as much material as they would if they weren't grading other papers; is that correct?

A. (No response.)

Q. How would the teacher suffer if she was to grade the students' papers?

A. If she was to grade all other papers?

Q. Uh-huh.

A. She would be overwhelmed. A lot of them would be overwhelmed. For instance, in math there's going to be a paper every day. If you had 140 students, how long is it going to [88] take you to grade them? A long time.

Q. You just testified –

THE COURT: Excuse me. Let's get this straight. Have you got any math teachers that have 140 students?

THE WITNESS: I believe I do, yes. I can't give you the name, but, yes.

THE COURT: Well, you're the principal. You should know, if anyone does.

THE WITNESS: I just filled out a report the other day. I had some teachers, I can't give you the specific names of them. I don't have that report with me, but there are some teachers that have that many.

THE COURT: In one class?

THE WITNESS: Well, I'm talking about in a seven period day.

THE COURT: Oh.

THE WITNESS: Total. Maybe I misled you. I'm sorry.

THE COURT: Okay.

THE WITNESS: But we have seven class periods with a total number of that.

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In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), which requires educational institutions to preserve the confidentiality of "education records," prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class.

PARTIES TO THE PROCEEDING

All parties are named in the caption.

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The opinion of the court of appeals is reported at *Falvo v. Owasso Independent School Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), and is printed at Appendix A of the Petition for Certiorari. The opinion of the court of appeals denying rehearing *en banc*, and the dissent of four of the ten active judges of the court of appeals from the order denying rehearing *en banc*, is reported at *Falvo v. Owasso Independent School Dist. No. I-011*, 233 F.3d 1201 (10th Cir. 2000), and is printed at Appendix D of the Petition for Certiorari. The opinions of the district court denying Falvo's motion for a temporary restraining order and granting summary judgment to Petitioners are unreported and are printed at Appendices C and B, respectively, of the Petition for Certiorari.

JURISDICTION

The court of appeals issued an opinion in this case on July 31, 2000, affirming in part and reversing in part the summary judgment granted by the district court. The Petitioners, Independent School District No. 11 of Tulsa County, Oklahoma (the "Owasso School District"), Dale Johnson, Superintendent of the Owasso School District, Lynn Johnson, Assistant Superintendent of the Owasso School District, and Rick Thomas, Principal of the Sixth Grade Center at the Owasso School District (hereafter referred to collectively as the "School District Defendants"), timely filed a petition for rehearing *en banc*. Although the court of appeals declined to grant rehearing, the court vacated its original opinion and issued a

modified opinion on October 4, 2000, responding to points raised in the petition for rehearing *en banc*. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves construction and interpretation of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"). The full text of FERPA is set forth in the appendix to this brief.

STATEMENT OF THE CASE

The facts recited in this statement are based on the undisputed record evidence.

The Owasso School District does not have a formal policy governing peer grading at its school sites. (Record in the Tenth Circuit, Aplee. Supp. App., pp. 152-54). Teachers employed by the Owasso School District have the discretion to permit their students to grade homework papers and tests by exchanging papers and scoring one another's work as the teacher goes over the answers aloud in class. (*Id.*; Petition for Certiorari, App. C-2-3). Teachers employed by the Owasso School District use this practice to varying degrees. (Record in the Tenth Circuit, Aplee. Supp. App., pp. 124-55). The Respondent, Kristja J. Falvo ("Falvo"), agreed that the use of peer grading by her children's teachers varied from teacher to teacher:

> There are some teachers that grade their own papers, and there are some teachers that have the children exchange papers. There are some teachers that have them only exchange maybe daily work. It's nothing that's concrete. It's from a teacher-to-teacher situation. It depends on how the teacher wants to run her classroom.

(J.A. 12).

It is undisputed that teachers do not use peer grading to grade mid-term exams (9 weeks tests) or final semester tests. (J.A. 33).

Teachers utilize peer grading because it allows them to give their students immediate feedback on the lesson. (J.A. 28, 31, 34-35; Petition for Certiorari, App. C-2). Discussion by the teacher of the correct and incorrect answers immediately after the student has performed the work reinforces the lesson taught and the correct answers. (J.A. 28).[1]

It would be impossible for many teachers in the Owasso School District to provide immediate feedback to students if the teachers were required to grade all homework and test papers themselves. In Oklahoma, teachers of grades seven through twelve may lawfully be assigned

[1] The significance of immediate feedback to a student's success in mastering the lesson was confirmed by the affidavit of one of Falvo's expert witnesses, Professor John D. Krumboltz. Professor Krumboltz noted in his affidavit that "[r]esearch findings confirm that immediate feedback aids learning more than does delayed feedback." (Record in the Tenth Circuit, Aplee. Supp. App., p. 227).

to teach up to 140 students per day. (J.A. 31, 34-35, 39-40).[2] It would be virtually impossible for a teacher to grade 140 homework papers or weekly quizzes overnight and have them ready to be returned the following day; a teacher in such a situation would be "overwhelmed." (J.A. 39). The district court found that if teachers are not able to utilize students to grade papers, "students will only receive their results after delay," which "may have a detrimental effect upon both teaching and learning." (Petition for Certiorari, App. C-6).

Peer grading also allows teachers to cover more material and assign significantly more work than would be possible if the teacher had to grade every individual homework paper. (J.A. 36; Petition for Certiorari, App. C-2). The district court found that without the ability to have students grade each other's papers, "teachers will begin assigning less homework and quizzes," which may

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[2] OKLA. STAT. tit. 70, § 18-113.3 (2000 Supp.) provides in part:

> C. Beginning with the 1996-97 school year and each school year thereafter, no teacher who is counted in class size count for grades seven through twelve shall be responsible for the instruction of more than one hundred forty (140) students on any given six-hour school day.

Teachers assigned to kindergarten through the sixth grade routinely teach classes of twenty (20) students. OKLA. STAT. tit. 70, §§ 18-113.1 and 18-113.2 (2000 Supp.). Over the course of a seven-period day, this would result in approximately the same workload as for teachers in grades K-6 as in grades 7-12. A school district that exceeds any of the statutory class size limitations may lose a portion of its state aid.

also "have a detrimental effect" upon education. (Petition for Certiorari, App. C-6).

Teachers prefer to have their students exchange papers and score each other's work rather than grade their own papers because some students will be tempted to cheat if they grade their own papers. (J.A. 28, 37). In addition, unrefuted testimony established that students are more likely to observe and mark errors on another student's homework paper or test than on their own simply because students are more likely to inadvertently overlook mistakes on their own papers. (J.A. 28).

After the correct and incorrect answers have been marked, the papers are returned to their owners. Many teachers then go over the answers again "while the student has his own paper in his hands" to reinforce the lesson. (J.A. 37). This not only provides further reinforcement as a learning process, but it also allows each student an opportunity to review his or her paper and confirm that it was graded properly. (J.A. 37). Students may then be asked to advise the teacher of the score on the homework or test, either by announcing the score aloud from their seats or by taking the paper to the teacher's desk and disclosing the score in confidence. (J.A. 26, 31-32, 35).

Teachers do not record or preserve every score or grade on every homework paper, quiz, or test that is corrected in class. Respondent Falvo admitted that because of this, it is impossible to know which of the grades that may be disclosed in class are selected by the teacher for recording and/or use in calculating a student's final grade:

> I don't know which ones do, and I don't know if there's a way, unless you're in the classroom and watching the grade book, if you can actually keep a record of which ones do [get recorded] and which ones don't. And so I don't have any guarantee that any grade or any average goes into the grade book. But I believe any grade that is called out has a *potential* to go into my son's, child's, my daughter's educational record.

(J.A. 14) (emphasis added).

Falvo is the mother of three children who attend schools operated by the Owasso School District at which peer grading occurs.[3] After moving her family into the Owasso School District and enrolling her children in schools operated by the Owasso School District, Falvo became aware that some of her children's teachers utilized peer grading. (J.A. 10, 22; Record in the Tenth Circuit, Aplt. App., p. 34). At that time, Falvo's son, Philip, was eligible for special education services for language-related skills and had been placed on an Individualized Education Program ("IEP") that provided him 45 minutes of speech and language therapy once a week. (Record in the Tenth Circuit, Aplee. Supp. App., pp. 148-51).[4] Falvo met with

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[3] In October of 1998, when Falvo brought this lawsuit, Falvo's daughter, Elizabeth Pletan, attended the Owasso School District's Eighth Grade Center, her son, Philip Pletan, attended the Owasso Seventh Grade Center, and her daughter, Erica Pletan, attended the Owasso Sixth Grade Center. (J.A. 11). A fourth child, Andrew, attended an elementary school where, according to Falvo, peer grading is not practiced. (J.A. 12-13).

[4] Philip's IEP was discontinued on March 3, 1999, because Falvo felt that it was not necessary for Philip to continue to receive language therapy. (Record in the Tenth Circuit, Aplee. Supp. App., p. 328).

Philip's teachers to express her dissatisfaction with allowing students to grade each other's papers and allowing the students to announce their scores in class. Philip's teachers assured Falvo that Philip did not have to announce his score and could go to the teacher's desk and reveal his score confidentially. (J.A. 22).

Falvo testified that Elizabeth, Philip, and Erica have been embarrassed by participating in peer grading. She testified that both Elizabeth and Philip have had correct answers marked as incorrect on papers graded by other students. (J.A. 11, 17-18). Yet Falvo admitted that each time one of her children had brought such a situation to the attention of his or her teacher, the teacher corrected the paper and allowed credit for the answer. (J.A. 18, 19-20). Indeed, the record reflects that every time one of Falvo's children has approached a teacher at the Owasso School District to request a change in that teacher's grading practices, the teacher has accommodated that request.

Falvo was not satisfied with the willingness of her children's teachers to modify their individual classroom grading practices to accommodate her children. Instead, Falvo demanded that the Owasso School District enact a uniform policy banning peer grading in all of its schools and requiring all teachers either to grade their students' papers themselves or to allow all students to grade their own papers. (J.A. 21). The Owasso School District refused to adopt such a policy, and Falvo sued.

On October 6, 1998, Falvo brought suit in the United States District Court for the Northern District of Oklahoma against the School District Defendants. Relying on 42 U.S.C. § 1983, Falvo alleged that the practice of peer grading as permitted at the Owasso School District violated her children's right of privacy protected by the Fourteenth Amendment and violated the confidentiality requirements of FERPA. Falvo sought damages, a declaratory judgment, and an injunction prohibiting the Owasso School District from permitting its teachers to allow students to grade each other's papers. (Record in the Tenth Circuit, Aplt. App., pp. 32-43).

Eight days after Falvo filed her complaint, the United States District Court for the Northern District of Oklahoma, the Honorable Terry C. Kern presiding, conducted an evidentiary hearing on Falvo's request for a temporary restraining order and a preliminary injunction. On October 16, 1998, the district court entered a written order declining to grant injunctive relief and setting forth the findings of fact and conclusions of law on which its decision was based. (Petition for Certiorari, App. C).

Without conducting any discovery or in any way further developing the factual record, Falvo filed a motion for declaratory judgment and partial summary judgment and supporting brief. (Record in the Tenth Circuit, Aplt. App., pp. 64-66; Aplee. Supp. App., pp. 191-270). Falvo supported her motion for partial summary judgment with affidavits from three college

professors.[5] (Record in the Tenth Circuit, Aplee. Supp. App., pp. 217-58).

The School District Defendants filed a cross-motion for summary judgment in which they agreed that the case presented no dispute as to any material fact and asserted that they were entitled to judgment as a matter of law. With regard to Falvo's FERPA claim, the School District Defendants relied on an opinion letter issued by the Family Policy Compliance Office ("FPCO") of the United States Department of Education that addressed the specific issue raised by this action. (Petition for Certiorari, App. F). The FPCO is the federal agency responsible for enforcing FERPA. In that letter, the FPCO concluded that using students to grade a test or homework assignment of another student and calling out that grade in class is *not a violation* of FERPA. The FPCO stated:

> FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.

(*Id.*, F-4-5).

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[5] The district court noted that these affidavits "largely take the form of expressing opinions as to what the law *should* be." (Petition for Certiorari, App. B-4, n.1) (emphasis in original).

The district court denied Falvo's motion for partial summary judgment and granted summary judgment to the School District Defendants. The court rejected Falvo's Fourteenth Amendment right of privacy claim, concluding that "the interim tests and homework assignments . . . are not 'highly personal' matters worthy of constitutional protection." (Petition for Certiorari, App. B-5). The court also rejected Falvo's FERPA claim, deferring to the FPCO's interpretation of the statute and concluding that such interpretation "is reasonable and does not conflict with the expressed intent of Congress." (*Id.*, B-4).

The United States Court of Appeals for the Tenth Circuit affirmed the district court's grant of summary judgment on Falvo's Fourteenth Amendment privacy claim, reasoning that although "the school work and test grades of pre-secondary school students constitute somewhat personal or intimate information," to conclude that such information is so highly personal as to fall within the zone of constitutional protection "would trivialize the Fourteenth Amendment." (Petition for Certiorari, App. A-8).

The court of appeals reversed the grant of summary judgment on the FERPA claim, ruling that the district court had erred in giving deference to the FPCO's interpretation of FERPA. The court ruled that "the meaning of the terms 'education records' and 'maintain' are clear from [FERPA] itself," thus deference to the FPCO was inappropriate because "a court can only defer to an agency's interpretation if a statute is deemed ambiguous." (*Id.*, A-18). The court of appeals found no ambiguity in FERPA that would justify deferring to the

FPCO's interpretation of the statute. The court further determined that the FPCO's interpretation was not "entitled to respect" under this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The court of appeals concluded that "[b]ased purely on the language of the statute itself . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA." (*Id.*, A-20-21). The court determined that a student who scores another student's homework or test paper is "a person acting for" an educational agency or institution who "maintains" the score or grade on such paper "to allow the teacher to use the grade in some fashion." (*Id.*, A-21, 24). The court concluded that this practice violated FERPA irrespective of whether the students announce their grades aloud in class or report their grades to the teacher in confidence. The court specifically noted that "the method of reporting the grades is irrelevant to our analysis, because a disclosure occurs at the earlier stage when one student grades the work of another." (*Id.*, A-21, n.10).

The court found no significance in the fact that the teachers have discretion to record or not record the grade for use in calculating the student's final grade in the class, reasoning that because "at least some grades which students give one another and report to the teacher are then recorded in the teacher's grade book," those grades are " 'maintained . . . by a person acting for [an educational] agency or institution' and constitute 'education records.' " (*Id.*, A-21). The court also noted in a footnote that "[e]ven if the homework or test grade never figures into the student's final grade, the teacher must still

receive the grade to use it for some other purpose, perhaps to preserve, in a gradebook or otherwise, a yardstick of each student's performance and progress to better develop effective teaching strategies." (*Id.*, A-24, n.11).

The court of appeals concluded that the Owasso School District's "grading practice does violate FERPA" and remanded the case to the district court for further proceedings. (*Id.*, A-32).

The School District Defendants timely filed a petition for rehearing *en banc*, which the court of appeals denied on October 4, 2000. (Petition for Certiorari, App. D). Four of the ten active judges on the Tenth Circuit Court of Appeals dissented from the denial of the petition for rehearing *en banc*. The dissenting judges observed that the court's decision "[d]efining 'education records' to include 'grades which students record on one another's homework and test papers and then report to the teacher' . . . is a vast expansion of the actual words of the statute, and [is] unsupported by the legislative history." (*Id.*, D-2-3). The dissenting members of the court concluded that "[a] careful reading of FERPA and its legislative history requires a much narrower definition of 'education records.'" The dissent noted that the majority's interpretation of the term "education records" to include the grades placed on daily homework papers and interim tests "necessarily invokes the right to a hearing to challenge the grade" recorded on that homework paper or interim test under 20 U.S.C. § 1232g(a)(2) and obligates educational institutions "to maintain an access record indicating those who have obtained or requested access to" the grade recorded on that homework paper or interim test under 20 U.S.C. § 1232g(b)(4)(A). The dissent

observed that "[g]iven the thousands of grades a student might receive over time, this seems impossible, if not implausible." (*Id.*, D-5).

The School District Defendants timely filed a petition for a writ of certiorari, and this Court granted certiorari herein on June 25, 2001.

SUMMARY OF THE ARGUMENT

The decision of the court of appeals is inconsistent with the plain language of FERPA. Congress defined "education records" as those records that contain personally identifiable information and are "maintained by an educational agency or institution or by a person acting for such agency or institution." The court of appeals distorted the plain meaning of the word "maintain" by reading it to include the *creation* of a "record" by a student scoring a homework paper, quiz, or test. In addition, the court of appeals illogically concluded that an "education record" is "released" in violation of the statute at the same instant it is created "by a person acting for" the educational agency or institution because the person who created the record knows the content thereof.

The court's interpretation means that the right granted by FERPA enabling parents to compel a due process hearing to correct "inaccurate" or "misleading" information in a student's "education record" applies to errors made in scoring the number of correct and incorrect answers on a student's daily homework paper, if the teacher utilized a student, teacher's aide, or parent or other adult volunteer to grade such paper. The court's

reading also imposes upon such teachers the obligation to maintain a separate record of access to and requests for access to each student's "education records" in the teacher's possession.

The court of appeals refused to follow the long-standing interpretation of FERPA followed by the Family Policy Compliance Office, the agency responsible for enforcing the statute. The FPCO's interpretation should have been accorded respect (if not deference) by the lower court because the FPCO properly recognized that Congress did not intend for FERPA to interfere with "normal and legitimate educational activities and functions."

The legislative history of FERPA indicates that Congress intended the statute to apply only to the permanent, institutional records maintained by a registrar or other central records custodian. The legislative history further indicates that Congress meant to exclude from the definition of "education records" teacher grade books, and the routine grades and scores recorded therein, because Congress intended the exception for notes and materials "in the sole possession of the maker thereof" to apply to grade books and their contents.

Finally, the court of appeals' interpretation of FERPA is far more intrusive than the court of appeals appeared to realize and will prohibit or burden a wide array of sound and beneficial educational practices followed by teachers in elementary schools, secondary schools, colleges, and universities.

ARGUMENT

1. The Plain Language of FERPA Shows that Congress Did Not Intend the Term "Education Records" to Include Grades on Routine Homework Assignments, Quizzes, and Tests.

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, provides in subpart (a)(1)(A) that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution . . . the right to inspect and review the education records of their children." Subpart (b)(1) of FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents. . . . " Thus, the text of the statute clearly identifies its two main purposes: to grant parents access to their children's education records and to protect those records from access by unauthorized persons.

The statute defines "education records" as follows:

> For the purposes of this section, the term "education records" means . . . those records, files, documents, and other materials which –
>
> (i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A).[6]

In concluding that FERPA prohibits peer grading of homework papers, quizzes, and tests in the nation's classrooms,[7] the Tenth Circuit focused on the two-part definition of education records found in subpart (a)(4)(A) of the statute. (Petition for Certiorari, App. A-18, 20-21). The court noted that the grades students place on each other's papers "contain information directly related to a student," thus satisfying the first part of the definition. (*Id.*, A-21). The court then reasoned that in placing a grade or

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[6] Four types of records are specifically excluded from the definition of "education records": "records of instructional, supervisory, and administrative personnel and education personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute" (sole possession notes), records created for law enforcement purposes by a law enforcement unit of an educational agency or institution, records relating exclusively to persons who are employed by an educational agency or institution but who are not attending such educational agency or institution as a student, and records relating to students over the age of 18 who attend postsecondary educational institutions that are made by a physician, psychiatrist, psychologist, or other professional made in connection with the provision of treatment to the student. 20 U.S.C. § 1232g(a)(4)(B)(i)-(iv). In regulations promulgated under FERPA, the Department of Education has also excluded alumni records containing only information about former students after they have left a school. 34 C.F.R. § 99.3.

[7] FERPA applies to "any public *or private* agency or institution which is the recipient of funds under any applicable program." 20 U.S.C. § 1232g(a)(3) (emphasis added).

score on another student's paper, students are preserving the grade for some further use by the teacher, thereby satisfying the second part of the definition. (*Id.*, A-24). The court concluded that FERPA was thereby violated because the "record" thus created is simultaneously "released" – or disclosed – to the student who prepared it.

The analysis of the court of appeals is seriously flawed. First, the court distorted the plain meaning of the word "maintain." "A fundamental canon of statutory instruction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perin v. United States*, 444 U.S. 37, 42 (1979). As the Solicitor General pointed out in the *amicus* brief filed in this matter on June 1, 2001, the ordinary meaning of the word "maintain" is "to keep in existence or continuance; preserve, retain." Brief for the United States as Amicus Curiae, p. 16, *quoting Random House Dictionary of the English Language* 1160 (2d ed. 1987).

Students scoring answers on a homework or test paper as correct or incorrect are not preserving existing information; *they are creating new information*. Until the paper has been scored and the number of correct or incorrect answers totaled, there exists no "record" to be "maintained." If Congress had meant for the word "maintain" to include the creation or collection of information, it certainly would have said so. Under the plain and ordinary meaning of the word "maintain," only those final grades that are recorded on the student's transcript and preserved in the educational agency's permanent, institutional records are "maintained" within the meaning of FERPA.

The Tenth Circuit interpreted "maintain" to mean the creation of information that may be preserved for a brief period of time to allow the teacher to make some use thereof. Yet by that logic, a student's work on a chalkboard could be an education record, because it is "maintained" until the teacher has checked the work and given the student permission to erase it.

In addition, the court of appeals illogically concluded that the "record" created when one student scores another's homework or test paper is "released" by the very act of creating it. According to the court, a student who scores another student's work is "a person acting for" the educational agency. (Petition for Certiorari, App. A-24). That student "maintains" the record by "preserving the grade until the time it is reported to the teacher for further use." (*Id.*). Yet the only "release" found by the court of appeals is that the student who was "acting for" the educational agency now knows the grade or score: "a disclosure occurs . . . when one student grades the work of another."[8]

This is both unreasonable and unsound. The statute cannot plausibly be interpreted to mean that when an educational agency or institution appoints a student to act as its agent in preparing a record, the very act of preparation by such agent constitutes an unlawful "release" or disclosure of that record. If that were the law,

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[8] The court of appeals made it clear that whether or not the grade is subsequently announced is irrelevant: "the method of reporting the grade is irrelevant, because a disclosure occurs at the earlier stage when one student grades the work of another." (*Id.*, A-21, n.10).

no educational agency or institution (including colleges and universities) could utilize students as teaching assistants to grade or record the grades of examination papers, reports, or written laboratory observations. It cannot plausibly be claimed that Congress intended this result.

The Tenth Circuit's decision is inconsistent with the plain meaning of FERPA. Its decision should be reversed.

2. The Court of Appeals' Interpretation of "Education Records" Cannot Be Reconciled with Other Provisions of the Statute.

The straight-forward reading of the words of the statute is confirmed when the phrase "education records" is considered in the context of other provisions of FERPA. As this Court explained in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 809. This point was reiterated in *Bailey v. United States*, 516 U.S. 137 (1995), wherein this Court again explained, "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Id.* at 145.

Viewed in the context of the entire statute and with a view to the overall statutory scheme, the term "education records" cannot reasonably be given the broad interpretation adopted by the court of appeals. The court of appeals' interpretation is inconsistent with two separate

substantive components of the statute: the right of parents to a hearing to challenge the contents of an education record, and the duty on the official "responsible for the custody" of a student's education records to maintain a separate record of those persons, agencies, or organizations that have requested or obtained access to those education records.

In subpart (a)(2) of FERPA, Congress specifically provided that parents wishing to "challenge the content" of a student's education records must be afforded "an opportunity for a hearing":

> No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

20 U.S.C. § 1232g(a)(2).

Under the Tenth Circuit's construction of "education records," every educational agency or institution that is subject to FERPA must provide a hearing to any parent who wishes to challenge the accuracy of any score or

grade recorded on any homework paper, quiz, or test by his or her child to correct or delete any "inaccurate" or "misleading" information contained therein if that homework, quiz, or test was graded by someone other than the teacher. In *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990), the Fifth Circuit suggested that this hearing right would apply to an education record that is "mathematically incorrect," noting that "[s]tudents' grades, as reflected in educational records, can only be inaccurate or misleading if they do not reflect what the grader intended or if they are mathematically incorrect." *Id.* at 891. Read in light of the Fifth Circuit's analysis in *Tarka*, the Tenth Circuit's interpretation of "education records" would entitle a parent to compel a school district to grant a hearing to correct the grade on a 10 point math paper or spelling test if a student, teacher's aide, adult volunteer, or team teacher graded that paper and properly marked only one answer as incorrect or one word as misspelled but mistakenly gave the paper a score of "8" instead of "9"out of 10.[9]

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[9] The Tenth Circuit supported its conclusion by suggesting that FERPA provides the necessary recourse for a parent to address a situation in which one student consistently records lower grades on another student's paper than that student actually earned, which might "significantly impact the slighted student's more permanent grades." (Petition for Certiorari, App. A-26). But as the School District Defendants explained in their Petition for Certiorari, the scenario described by the Tenth Circuit, in which a student's final course grade is affected, would also be an appropriate situation for a curative hearing under the School District Defendants' reading of the statute. (*Id.*, p. 25, n.10). But the court of appeals failed to offer any explanation why Congress would have granted such a hearing right to challenge the score recorded on a routine homework

Moreover, the hearing required by subpart (a)(2) must be conducted "in accordance with regulations of the Secretary." Pursuant to regulations promulgated by the Department of Education, the *minimum requirements* for such a hearing include that the hearing be conducted by a disinterested official of the educational agency or institution (or by another disinterested individual) and that the parent or eligible student be allowed "a full and fair opportunity to present evidence relevant to the issues raised. . . . The parent or eligible student may, at their own expense, be represented by one or more individuals of his or her own choice, including an attorney." 34 C.F.R. § 99.22. Thus, a parent (or an eligible student) seeking to challenge an inaccurate or misleading education record is entitled to an evidentiary hearing before a neutral decisionmaker at which the parent may be represented by an attorney of his or her choice. It cannot be seriously suggested that Congress intended to compel educational agencies and institutions to hold formal due process hearings to allow parents to contest the scores recorded on their children's routine class work any time someone other than the classroom teacher scores or grades the paper. Such a requirement would dramatically change educational practices not only in our nation's schools but also on college and university campuses, where the use of student assistants to grade papers is common.

Equally problematic for the Tenth Circuit's analysis is the access record requirement of 20 U.S.C. § 1232g(b)(4)(A). That provision states.

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paper when the score on that paper fails to impact the student's ultimate grade in the course.

> Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals . . . agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, *to the school official and his assistants who are responsible for the custody of such records*, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

20 U.S.C. § 1232g(b)(4)(A) (emphasis added).

Because the court of appeals concluded that every grade or score recorded by another student on a homework paper or test is an education record, notwithstanding that those grades may never be recorded in the teacher's grade book, the court of appeals' analysis means that *every teacher* is a custodian of "education records" within the meaning of subpart (b)(4)(A) if papers graded by a student, teacher's aide, adult volunteer, or team teacher are delivered to the teacher. Thus, every such teacher has the obligation to keep a *separate record* for each of his or her students to indicate all individuals, agencies, or organizations "which have requested or obtained access" to that student's papers and identifying "the legitimate interest that each such person, agency, or organization has in obtaining this information."

The imposition of this obligation to maintain such an access record, without more, leaves no doubt that Congress did not intend for the routine grades recorded by teachers on a daily basis to fall within FERPA's definition of "education records."

More important, however, is the fact that in subsection (b)(4)(A), Congress expressly provided for a single school official (and his assistants) to be "*responsible for the custody*" of education records. This language reflects a Congressional intent that there be a *central custodian* of education records at each educational agency. Under this construction of FERPA, the official "responsible" for these education records is clearly intended to be the educational agency's registrar.

This interpretation of FERPA is consistent with the practices of educational agencies and institutions across America, with which Congress must be presumed to have been familiar. An educational agency or institution's registrar is commonly "responsible for custody" of the permanent, institutional records of that educational agency or institution, and the registrar often has assistants who share the responsibility for these duties.

The Tenth Circuit rejected this interpretation, however, finding no inconsistency between FERPA's requirement that "the school official . . . responsible for the custody of such records" also maintain an access record and the court's determination that every grade or score written on every paper graded by a student, teacher's aide, adult volunteer, or team teacher is an education record. According to the court of appeals, "[N]othing in this court's interpretation of the term 'education records'

would prohibit a central custodian from maintaining these access records. . . . " (Petition for Certiorari, App. A-28). Yet this statement ignores the fact that FERPA expressly requires that the access record be kept with each student's education records: "Each educational agency or institution shall maintain a record, *kept with the education records of each student*," identifying those persons, agencies, or organizations that have requested access. 20 U.S.C. § 1232g(b)(4)(A) (emphasis added).

Because the plain language of subpart (b)(4)(A) states that the access record shall be kept with the student's education records *and* be available to "the school official and his assistants who are responsible for the custody of such records," the Tenth Circuit's suggestion that a central custodian of records can maintain the access record is incorrect. If the scores on routine classroom papers that are graded by anyone other than the teacher are, in fact, education records, then the teacher is clearly the "custodian" of those education records and must, of necessity, be responsible for maintaining the access record required by subpart (b)(4)(A).

Indeed, under the court of appeals' interpretation, *until* the papers are turned in to the teacher, the person scoring the paper is the agent of the educational agency or institution and is "maintaining" the record, thus the statutory duties of subpart (b)(4)(A) would devolve upon him. It cannot reasonably be suggested that Congress intended to impose this duty on student assistants or adult volunteers.

The court of appeals' conclusion that "education records" includes the grades placed on daily homework

papers and routine tests is at odds with FERPA's overall statutory scheme. The four judges who dissented from the denial of rehearing *en banc* correctly noted that the court of appeals' decision makes the hearing right of 20 U.S.C. § 1232g(a)(2) as well as the access record requirement of 20 U.S.C. § 1232g(b)(4)(A) applicable to "the thousands of grades a student might receive over time." (Petition for Certiorari, App. D-5). As Justice Ginsburg noted in her concurring opinion in *Things Remembered, Inc. v. Petraraca*, 516 U.S. 124 (1995), "It would show little respect for the legislature were courts to suppose that lawmakers meant to enact an irrational scheme." *Id.* at 135 (Ginsburg, J., concurring). The court of appeals attributes to Congress a legislative scheme that is both "implausible" and "impossible." (Petition for Certiorari, App. D-5). The Tenth Circuit's decision was wrong and should be reversed.

3. The Court of Appeals Should Have Deferred to the Established and Long-Standing Interpretation of the Family Policy Compliance Office.

The sensible reading of the statute by the dissenting judges in the court of appeals takes on added weight because it is the interpretation consistently followed by the agency charged with administering the statute.

The court of appeals gave two reasons for refusing to defer to the FPCO's interpretation. First, the court characterized the statutory language defining "education records" as "clear on its face" in requiring the interpretation it adopted. (Petition for Certiorari, App. A-26). The preceding sections of this brief demonstrate the error of

that assertion. Indeed, under the most natural reading of the word "maintained," a score or grade on a paper is not maintained until the teacher decides that it will be recorded for future use in determining a course grade, and a record is not "released" to a student by that student's act of creating such record. Also, the broad definition of "education records" adopted by the court of appeals simply cannot be squared with FERPA's grant of a hearing right to challenge the content of "education records" and the statute's obligation, imposed on "the school official . . . responsible for the custody" of such records, to maintain a separate record of access.

The second reason advanced by the court of appeals for rejecting the FPCO's position was its conclusion that the July 15, 1993, opinion letter from LeRoy S. Rooker, the Director of the FPCO, to Wallace N. Raupp, II, Labor Relations Specialist with New York State United Teachers, setting forth the FPCO's interpretation (Petition for Certiorari, App. F-3-6), lacked "the power to persuade" and therefore was not "entitled to respect" under this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court of appeals observed that under this Court's recent decision in *Christensen v. Harris County*, 529 U.S. 576 (2000), the deference a court would ordinarily accord to an agency's interpretation of an ambiguous statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not extend to an interpretation contained in an opinion letter. (Petition for Certiorari, App. A-18-19).

As support for its conclusion that the FPCO letter was unpersuasive under *Skidmore*, the court of appeals

pointed to a qualifying statement in the letter and suggested that "the FPCO may not have thoroughly considered the issue. . . . " (*Id.*, A-19).[10] The court further found the FPCO opinion "bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not 'maintained' as required under FERPA." (*Id.*, A-20). Finally, the court found significant the FPCO's use of the language " 'maintained' by an educational agency or institution" rather than the broader language from FERPA that encompasses records "maintained by an educational agency or institution *or by a person acting for such agency or institution.*" (*Id.*, A-20, quoting 20 U.S.C. § 1232g(a)(4)(A)(ii) (emphasis added by court)).

Although the court criticized the FPCO for failing to "thoroughly consider[ ] the issue" and characterized the agency's analysis as "cursory and purely hypothetical," the court failed to identify any additional factors relevant to the issue of peer grading that the FPCO had overlooked. The court did not point to any fact or consideration present in this case that might have caused the FPCO to reach a different conclusion. Because the court failed to specify any further issues that the FPCO should

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[10] In its July 15, 1993, letter, the FPCO stated:

> Because you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District's participation in the activities would violate rights afforded parents by FERPA. However, below is a general discussion of FERPA as it relates to the types of activities you present.

(Petition for Certiorari, App. F-3-4).

have considered or any further analysis that the FPCO should have performed, the court's criticism of the FPCO's consideration of this issue as "hypothetical" rings hollow.

The court of appeals' criticism of the FPCO letter as "bereft of any reasoning" to support its result is likewise unfounded. The FPCO specifically stated in its opinion letter that FERPA is not "intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions." The FPCO went on to explain that "a thoughtful, common sense, and flexible approach is necessary" in judging the impact of classroom activities on a student's rights under FERPA. (Petition for Certiorari, App. F-4). Thus, contrary to the court of appeals' implication, the FPCO did not merely state a conclusory opinion; it explained the rationale underlying its analysis.

Finally, contrary to the court's reasoning, the language "maintained . . . by a person acting for such agency or institution" does not undercut the FPCO's analysis. To the contrary, as was discussed at p. 18, *supra*, the court's focus on that language leads to the absurd conclusion that a record is unlawfully *disclosed* at the instant the person acting as the agent of the educational agency *creates* it.

As the following two sections of this brief will show, the FPCO correctly discerned Congress' intent and rightly anticipated that a contrary interpretation would have chaotic consequences.

4. The Legislative History Supports the Family Policy Compliance Office's Interpretation and Refutes the Analysis of the Court of Appeals.

The legislative history of FERPA, although somewhat limited, reflects an intent by Congress to limit "education records" to those central, institutional records maintained in a student's permanent file. Indeed, in its initial version, FERPA applied to

> any and all official records, files, and data directly related to [a student], *including all material that is incorporated into each student's cumulative record folder*, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.

Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974) (emphasis added).

Congress amended FERPA in December of 1974 and replaced this laundry list of protected records with the current definition of "education records." Pub. L. No. 93-568, § 2, 88 Stat. 1855, 1858 (1974). The authors of the amendment placed a joint statement concerning the proposed amendment into the Congressional Record, making clear that the change was not intended to expand the reach of the statute beyond institutional records. With

regard to the hearing right granted by subpart (a)(2) and discussed at pp. 20-22, *supra*, the joint statement of Senator James L. Buckley of New York and Senator Claiborne Pell of Rhode Island provided:

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given in the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of *institutional records* which record the grade which was actually given. Thus, the parents of a student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to law contest whether the teacher should have assigned a higher grade because the parents or students believe that the student was entitled to the higher grade.

120 Cong. Rec. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment) (emphasis added). Legal commentators have noted that the joint statement was printed "at a time when no committee hearings had been held and no other document existed that spelled out the intentions of FERPA's sponsors . . . [and] has become important to judges forced to interpret the statute." Thomas R. Baker, *Inaccurate and Misleading: Student Hearing Rights Under FERPA*, 114 Ed. Law Rep. 721, 726 (Feb. 1997). The Fifth Circuit relied on the joint statement as reflecting the intent of Congress with regard to the extent of the hearing right granted by 20 U.S.C. § 1232g(a)(2) in its decision in *Tarka v. Cunningham*, 917 F.2d at 892.

Because the sponsors of the amendment that inserted the present definition of "education records" into FERPA

stated that the right to a hearing to challenge "education records" was intended only to apply to *institutional records*, the term "education records" should be interpreted consistently with that intent.

The legislative history also suggests that a third subpart of FERPA – the sole possession notes exception of subpart (a)(4)(B)(i)[11] – excludes from the definition of "education records" the kind of routine homework and test grades at issue here. Senators Buckley and Pell stated:

> The amendment makes certain reasonable exceptions to the access by parents and students to school records. The private notes and other materials, *such as a teacher's daily record book*, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aids would not be available to parents or students, provided they are not revealed to another person, other than in the case of a substitute who performs another's duties for a temporary period.

120 Cong. Rec. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment) (emphasis added).[12]

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[11] *See* note 6, *supra*.

[12] In *Letter to Yorba Linda (CA) Elementary School District*, 257:626 EDUC. FOR THE HANDICAPPED LAW REPORT (Dec. 31, 1984), the Office for Civil Rights of the United States Department of Education responded to a complaint under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, in which a parent alleged that a teacher intentionally destroyed his child's "achievement and performance records," specifically, the teacher's grade book. Without citing FERPA, the Office for Civil Rights noted that although most of the teachers at the school district under investigation did keep a grade book, that grade book was "not a document that is reviewed by other staff or kept as part of the formal educational record." The California State Department of Education further informed the Office for Civil Rights that "a teacher's record book is a personal record which is not a part of the educational records maintained by the district. . . . " The Office for Civil Rights found no violation of Section 504 under these facts.

The court of appeals found this subpart inapplicable to this dispute, asserting that a teacher's grade book becomes an education record if it is disclosed to anyone other than a substitute. The court then reasoned that a grade book is effectively disclosed to students if the students are aware of a grade or score that will ultimately be recorded in the grade book. (Petition for Certiorari, A-22).

This reasoning cannot withstand scrutiny. First, as the four dissenting judges noted, there is a major distinction between raw grades or scores on student papers (that may or may not ultimately be considered in calculating a student's final course grade) and grades actually recorded in a grade book. (Petition for Certiorari, App. D-3-4). If Congress had contemplated that a grade that has not yet been recorded – and may never be – could nonetheless be an "education record," surely it would have used different words than those appearing in the statute. The dissenting judges correctly observed that "[w]hile grade books *may* qualify as institutional records, grades on papers certainly do not." (*Id.*, D-5) (emphasis added).

Moreover, Falvo acknowledged that it is impossible to know at the time students score each other's papers

whether a teacher will or will not record that score or grade in his or her grade book. (J.A. 14). Faced with reconciling this fact with FERPA's application only to "records" that are "maintained," the Tenth Circuit concluded (1) that the student grading the paper is "maintaining" the grade until it is turned in to the teacher, and (2) that a grade is "maintained" so long as the teacher is using the grade for *some purpose*, including "to preserve . . . a yardstick of each student's performance and progress to better develop effective teaching strategies." (Petition for Certiorari, App. A-24, n.11). As previously noted at p. 18, *supra*, and as is discussed in more detail at pp. 39-40, *infra*, this logic leads to the absurd result that student work on a chalkboard is an "education record" because such work has been preserved on the chalkboard until the teacher checks the work and directs the student to erase it.

The second flaw in the court of appeals' analysis of the "sole possession notes" exception is that it results in wholly illogical distinctions between the treatment of identical grade books. Assume teacher A and teacher B both maintain grade books that they disclose to no one other than a substitute teacher. Assume their principal asks to see teacher A's grade book for an entirely appropriate reason, such as to confirm that a student was absent from teacher A's class on a certain day.[13] Under

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[13] Under 20 U.S.C. § 1232g(b)(1)(A), this disclosure would not be a violation of FERPA, but the Tenth Circuit would hold that such disclosure does result in the grade book becoming an education record under 20 U.S.C. § 1232g(a)(4)(B)(1) and entitling parents to the hearing rights conferred by 20 U.S.C. § 1232g(a)(2).

the Tenth Circuit's analysis, teacher A's grade book has now become an education record to which FERPA applies, whereas teacher B's grade book remains excluded from the definition of education record. This is both unsound and illogical.

The third flaw in the court of appeals' analysis is that it effectively eviscerates the "sole possession notes" exception as it relates to any notes containing information that was disclosed to a teacher or school official by a third party other than a substitute. Under this analysis, any information disclosed by one student about another – as in the case of peer grading – would be an education record. For instance, assume that student A tells her counselor that she thinks her best friend, student B, is being molested by student B's parent. Assume the counselor records this information on a confidential memorandum to the counselor's file. Under the Tenth Circuit's analysis, the counselor's note would be an education record that student B's parent would be entitled to see, because student A is also aware of the information recorded by the counselor on the memorandum.

The legislative history of the "sole possession notes" exception, and the foregoing examples, show that Congress simply could not have intended for the routine grades recorded in a teacher's grade book to be considered "education records." As the dissenting judges noted, the court of appeals' decision "is a vast expansion of the actual words of the statute, and [is] unsupported by the legislative history." (Petition for Certiorari, App. D-2-3).

5. The Court of Appeals' Interpretation of FERPA Needlessly Burdens Sound Educational Practices.

The decision of the court of appeals has caused widespread concern and confusion, not only about the legality of peer grading, but about many other common and well established educational practices. For example, the Tenth Circuit's decision has called into question the propriety of allowing parent volunteers to check papers, displaying graded student artwork and science projects, and publishing honor rolls or lists of students with perfect attendance. Greg Toppo, Associated Press, *Students Checking Each Other's Work May Not Make the Grade*, WASHINGTON POST, July 15, 2001, at A4. *See also*, Gregory H. Perry, *Volunteers Enter the Schoolhouse Gate*, 79 NEB. L. REV. 998, 999 n.7 (2000); Heather May, *Pupil Graded Work Fails Privacy Test*, SALT LAKE TRIBUNE, Sept. 7, 2000, at A1.

It is difficult to imagine how some courses could be conducted under the Tenth Circuit's reasoning. In band, orchestra, and music classes, students earn the rank of "first chair," "second chair," "third chair," etc., by virtue of their performance on playing tests that occur in class. Every student in the band or orchestra knows who is first chair on any instrument. In speech, drama, and debate classes, students not only observe each other's performances, but they also often participate in evaluating those performances, and all of the students in those classes know who the teacher has selected for speech and debate competitions or for the lead roles in a class theatrical performance project. Students in fine arts classes see each other's creations, whether a painting, sculpture,

collage, or other project, take shape over the course of the school year and know whose pieces have been selected by the teacher for public display, even if no names appear on those pieces.

Moreover, the Tenth Circuit's decision would prohibit teachers from grading projects assigned to teams of students on the basis of the team's performance, because if the teacher gives a "team grade," everyone on the team will know that his or her teammates received the same grade. Yet teachers often choose to grade such projects on a team basis for the very purpose of encouraging the students to learn to work together, apportion duties, and carry their own share of the load. Assigning a grade to the team, rather than to each individual team member, is an effective means of promoting these goals.

At the college level, the decision below would imperil the use of teaching assistants to grade papers. At the law school level, it would imperil the use of law fellows in legal research and writing programs.

With respect to peer grading in pre-secondary schools (the subject of this case) and high schools, the decision of the lower court denies teachers the right to an established and pedagogically useful educational tool.[14]

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[14] In the WASHINGTON POST article, the author described how one teacher, when needing quick results from a quiz in her Spanish class, "has her students pass their work to classmates and then goes over the answers with them. In a few minutes, she knows who understood the lesson and who did not." Toppo, WASHINGTON POST, at A4. Another teacher from Bismark, North Dakota, explained that "asking students to swap papers is essential for her because she teaches five classes and 130

There is no dispute that students benefit from the immediate feedback peer grading facilitates.[15] Moreover, evidence strongly indicates that peer grading itself has educational benefits that support its continued use. A report published by the Oregon University System in 1998 focusing on the implementation of standards-based education in Oregon included the following student comments regarding the benefits of peer grading:

> At three high schools, students in some PASS [Proficiency-based Admissions Standards System] classes were involved in peer review and peer editing. When reviewing each other's work, students used the same scoring guides that their teachers used. Two students shared their positive experiences:
>
> "We've been doing a lot of peer editing, which is really helpful to see what kind of mistakes other people are making and to see how to correct them. For example, [one student] helped me find out how to eliminate passive voice, and that really improved my writing. And by correcting other people's papers, I see similar mistakes that they're making, but because I didn't write it, I have another view on it."

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students a day." *Id.* A Utah teacher quoted by the SALT LAKE TRIBUNE stated that "she would spend 30 hours a week correcting papers if she didn't have help from her students." She pointed out that such time is "better spent actually teaching her students." May, SALT LAKE TRIBUNE, at A1.

[15] *See* Note 1, *supra*.

The second student continued:

> "I think it helps, too, because grading other people's papers, you see those mistakes, and it helps you look at your own writing, to . . . kind of read it impersonally, and you know I see so many more mistakes in my own writing. I can just look right through and do a pretty good correction of a first draft for myself."

Implementing the PASS System: How Students Perceive Its Effect on Their Learning, Oregon University System PASS Reports, Fall 1998, No. 1, p. 7 (available at *http://www.ous.edu/pass/documents/archive.html/*).

The analysis of the lower court, if endorsed by this Court, would fundamentally alter the way children are taught in our nation's classrooms. For instance, assume a teacher is instructing children in mathematics. After working a number of problems on the board to demonstrate the principles involved, the teacher writes a problem on the board and invites a student to come to the front of the class and solve it. Obviously, if the student makes a mistake, the teacher must correct it, or the class will be confused. But the teacher's correction means that the error committed by a personally identifiable student has now been communicated to the class. Moreover, it is conceivable that the student's error, or an accumulation of such errors over the school year, might influence the final grade the teacher assigns to that student. At the very least, the teacher might take the student's performance into account in determining whether the class needs additional time on this lesson or is ready to move ahead to the next group of problems.

The foregoing scenario occurs every day in classrooms across America. Yet under the Tenth Circuit's analysis, the teacher has violated FERPA. A personally identifiable "education record" has been created and maintained on the chalkboard, received by the teacher, and disclosed to every other student in class. The only way to avoid violating FERPA here is either (1) to stop letting students try to solve problems, or (2) to stop teachers from correcting the students' mistakes. Congress did not mean to turn traditional teaching methods upside down when it enacted FERPA.

Falvo brought this action because her children were "embarrassed" by the peer grading practiced at the Owasso School District. The School District Defendants appreciate the desire of a parent to shield her children from life's unpleasantness. Yet prohibiting peer grading will not stop children from being embarrassed in school. Children who look different, who speak with a different accent, who run slower on the playground, who are taller or shorter or heavier or thinner than their classmates, will, at times, be teased and ridiculed by those classmates.

Prohibiting peer grading will not insulate students from embarrassment. It will, however, needlessly burden education. Should this Court affirm the decision of the Tenth Circuit, the law will be "clearly established" that FERPA prohibits educational practices utilized by teachers everywhere. Those educational practices will then be abandoned. Because there are well-established pedagogical benefits promoted by peer grading, and because there is no indication that Congress intended

FERPA to alter those practices, the School District Defendants submit that there must be some strong countervailing principle to justify departing from the analysis followed by the FPCO and invalidating an educational practice as old as our nation. Neither the court of appeals nor Falvo has articulated such a principle. The decision of the court of appeals in this case should be reversed.

CONCLUSION

Viewed in light of the two goals Congress intended FERPA to advance, allowing parents access to their children's educational records and protecting those records from access by unauthorized persons, the Tenth Circuit's analysis sweeps far too broadly. It is readily apparent that the goal of allowing parental access to student records is not in any way promoted by construing daily homework papers and routine tests as "education records." Falvo herself testified that she learned of the Owasso School District's practice of peer grading by examining the school work her children brought home. (J.A. 10). Nothing in the text or legislative history of FERPA suggests that Congress perceived that schools across America were denying parents access to routine papers such as this.

The second goal of FERPA is to protect education records from access by unauthorized persons. Nothing in the text of the statute or in its legislative history suggests that Congress ever contemplated that the "records" Congress sought to protect included scores on daily homework assignments and routine tests. The FPCO's position with regard to peer grading has been public since at least

1993, yet Congress has never acted to amend the statute or otherwise disapprove of the FPCO's interpretation.

The decision of the court of appeals radically alters how teachers may conduct their classrooms. This Court should not endorse such a radical change in educational practices without a strong showing that Congress intended such a result, and there is no such indication in the text or legislative history of FERPA. The decision of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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20 U.S.C. § 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the

right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations –

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii)

such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include –

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following –

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted –

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if –

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed

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[1] So in original. The period probably should be a comma.

when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless –

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall

be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding –

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from –

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if –

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

REC'D TEAM 11

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No. 00-1073

Supreme Court, U.S.
FILED

OCT 12 2001

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011,
A/K/A OWASSO PUBLIC SCHOOLS, ET AL.,
Petitioners,

v.

KRISTJA F. FALVO, AS PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN AND ERICA PLETAN,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS ON THE MERITS

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October 12, 2001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), which requires educational institutions to preserve the confidentiality of "education records," prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class.

PARTIES TO THE APPEAL

The caption of the Brief for Petitioners lists all parties to the appeal.

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BRIEF OF RESPONDENT ON THE MERITS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Kristja J. Falvo, as parent and next friend of her minor children, Elizabeth Pletan, Philip Pletan and Erica Pletan, respectfully submits her Brief on the Merits to this Honorable Court. Respondents seek affirmance of the decision of the United States Court of Appeals for the Tenth Circuit in *Falvo v. Owasso Independent School District No. I-011*, 229 F.3d 965 (10th Cir. 2000), that Petitioners violated the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, by establishing a policy or practice of allowing teachers to require students to grade one another's tests and other work and to call out their own grades in class.

JURISDICTION

The issue on appeal arises under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), and jurisdiction is conferred on this Court pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). This action also arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202.

This Court has subject matter jurisdiction over this action, because the specific violation of FERPA which Falvo alleged is actionable under § 1983. Here, Falvo not only asserted a specific violation of FERPA under § 1983, she also requested relief under 28 U.S.C. §§ 2201, 2202. Accordingly, subject matter jurisdiction is present.

The issue of whether Respondents could bring a 42 U.S.C. § 1983 action against Petitioners for violations of FERPA has not been raised in the question presented or briefed by Petitioners, and accordingly should not be considered by the Court. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals *and included in the question on which we granted certiorari*") (emphasis supplied); *Blessing v. Freestone*, 520 U.S. 329, 340, n. 3 (1997) (declining to address issues of Eleventh Amendment application and whether *Maine v. Thiboutot* should be overruled as neither decided below nor presented in the petition, citing SUP. CT. RULE 14.1(a)); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

In the event the Court elects to address the issue of jurisdiction under § 1983, it is clear from the language and intent of FERPA that Congress enacted the statute to afford parents of public school students such as Respondents the right to consent to the disclosure of their educational records. As the Tenth Circuit observed, a consensus has developed among the federal courts that a § 1983 civil rights lawsuit may be predicated upon a violation of FERPA. 229 F.3d at 965, citing *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2nd Cir. 1986); *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664, 672-74 (D. Minn. 1999); *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1107 (Dist. S.D. 1995); *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 47-48 (Dist. N.H. 1994); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991), and contrary authority, *Gundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996); *Norris v. Board of Educ. of Greenwood Community Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992).

The Supreme Court has "repeatedly held that coverage of § 1983 must be broadly construed. The legislative history of the section also stresses that as a remedial statute, it should be liberally and beneficently construed." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (internal quotations and citations omitted). In *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court explained that a plaintiff seeking § 1983 redress must assert the violation of a federal right. To determine whether a federal statute confers a right enforceable under § 1983, a court must consider the following factors: (1) whether the plaintiff is an intended beneficiary of the statute; (2) whether the plaintiff's asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce; and (3) whether the statute imposes a binding obligation on the State actor. 520 U.S. at 340-341. Since Falvo's specific, asserted claims under FERPA satisfied each of these three criteria, the Tenth Circuit correctly held that Falvo may maintain a § 1983 action.

The plain language of FERPA reveals that it is intended to protect the right to privacy of students and their parents. Section 1232g(a)(1)(A) provides in pertinent part that "the parents of students" have the *'right to inspect* and review the education records of their children." This subsection further provides that "each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children."

Consistent with this subsection, § 1232g(b)(1), the section implicated here, provides that an educational institution shall not release education records or personally identifiable information contained therein "without the written consent of their parents." Section 1232g(b)(2)(A) reiterates the parent's right to consent by providing that no educational institution shall have a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information without parental consent. Thus, Congress conferred on Falvo a specific "*right to consent*" to the release of education records of her children, or any information contained therein.

Section 1232g(d) also provides that the "rights" conferred on a parent are extended to a "student who has attained the age of eighteen years of age, or is attending an institution of postsecondary education." Thus, "the *rights* accorded to the parents of the student shall thereafter only be required of and accorded to the students." Moreover, § 1232g(e) specifically provides that parents or students must be informed of their "*rights* accorded them by this section."

The foregoing demonstrates the specific intent of Congress to explicitly confer rights and benefits to parents and students that previously did not exist. Indeed, prior to the enactment of FERPA, parents and students were without specific rights to access or consent to release of their educational records. Moreover, the sponsors of FERPA stated, "[t]he purpose of the Act is two-fold – to assure parents of students [the right to] access... their education records and to protect such individuals' *rights to privacy*...." 120 CONG. REC. 39862 (Dec. 13, 1974). The benefits Congress intended to confer on parents and students are thus

sufficiently specific and definite, and well within the judiciary's competence to enforce. The relevant provision of FERPA, therefore, was intended to benefit Falvo and her children.

Additionally, the Tenth Circuit correctly held that § 1232g(b)(1) reflects a binding obligation on schools that have received or are the recipients of federal funds, rather than a mere Congressional preference for a certain kind of conduct. Indeed, if a school received federal funds then it is obligated to comply with extending the rights conferred under the foregoing provisions. The language of this provision has been similarly interpreted by this Court as creating "precise requirements." *Suter v. Artist M.*, 503 U.S. 347, 361 n.12 (1992). FERPA repeatedly employs the mandatory language, "shall," rather than merely precatory language. *See, e.g.*, 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available...."). In fact, the mandatory language "shall" is employed in every substantive subsection of the Act, without exception. Accordingly, the right conferred under § 1232g(b)(1) makes clear that it is neither vague nor amorphous and, thus, within the judiciary's competence to enforce. *Accord Livadas v. Bradshaw*, 512 U.S. 107, 134 (1994) (right of employees to complete collective bargaining process and agree to arbitration clause "is, if not provided in so many words in the [National Labor Relations Act], at least [] immanent in its structure...."); *Cannon v. University of Chicago*, 441 U.S. 677, at 690, n. 13 (1979) (citing "rights-creating language" in Title IX and Title VI, 42 U.S.C. § 601, in holding implied right of action existed to enforce Title IX). *Cf. Alexander v. Sandoval*, 532 U.S. 275, 530 (2001) ("rights-creating" language of § 601

critical to *Cannon* analysis contrasted with that of § 602 limiting agencies to "effectuating" rights created by § 601).[1]

Finally, Congress did not expressly or impliedly foreclose § 1983 remedies in FERPA. Congress clearly did not expressly forbid recourse to § 1983 in the statute itself. Indeed, the "provisions of the amendment do not affect whatever *rights a student or his parents* might have in *civil proceedings*." 120 CONG. REC. 39863 (Dec. 13, 1974). Also,

> [i]t is the hope of the sponsors of this amendment that it will do much to clear up many of the unanswered questions, so that the substance of the provisions may be carried out in schools and colleges across the country as soon as possible, and so that *parents and students may properly begin to exercise their rights under the law, and the protection of their privacy may be assured.*

Id. (emphasis added).

This Court has held that an administrative scheme, which provides the administering agency the power to *cut off federal funds*, was "insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 425 (1987). The Supreme Court reached the same conclusion in *Wilder v. Virginia Hosp. Ass'n*, in which it held that the Secretary of Health and Human Services had power to withhold federal funding to States whose plans did not comply with federal law. 496 U.S. 498, 521 (1990). Moreover, the Owasso School District failed to establish the difficult showing that allowing such actions to go forward in these circumstances would be inconsistent with Congress' carefully tailored scheme. *See Blessing*, 520 U.S. at 341. As the Court stated in *Virginia Hosp. Ass'n*:

> "'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Wright [v. Roanoke]*, 479 U.S. at 423-424 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). The burden is on the State to show "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright, supra*, at 423.

Wilder, 496 U.S. at 520-521. Petitioner has not even attempted to meet this burden here. Accordingly, the Tenth Circuit correctly concluded that the Department of

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[1] The Supreme Court observed in *Cannon*:

> Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, *this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff* in the case.

441 U.S. at 690, n. 13 (emphasis supplied). *Cannon* was decided the year before *Maine v. Thiboutot*, 448 U.S. 1 (1980) held that a statutory right could be enforced via § 1983. Respondents submit that FERPA satisfies not only the § 1983 standard of *Thiboutot*, but the higher standard for an implied right of action applied to a similar educational spending statute in *Cannon*.

Education's oversight powers were insufficiently comprehensive to close the door on § 1983 liability.

Further, even apart from Falvo's actionable § 1983 claim, this Court has recognized that plaintiffs may vindicate their claims by seeking declaratory and equitable relief in federal district courts under 28 U.S.C. §§ 2201 and 2202. *See Golden State v. City of Los Angeles,* 493 U.S. 103 (1989). Indeed, this Court explained that "[t]hese statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983." As such, Falvo's claims are actionable under 28 U.S.C. §§ 2201 and 2202.

STATUTORY PROVISION INVOLVED

This case involves application of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. The full text of FERPA is set forth in the Petitioners' appendix to their Brief on the Merits.

STATEMENT OF THE CASE

The Owasso School District has a district-wide custom of permitting its teachers to circumvent FERPA's prohibition against the nonconsensual release of student grades. Students may be required by teachers to "call out" their exam grades for the *sole purpose* of allowing teachers to record their grades in a grade book or other student file. (J.A. 14-15) The grade being "called out" is information that is maintained by the Owasso School District, by and through its agent, the teacher. Owasso has no policy that prohibits teachers from compelling students to disclose their grades. (J.A. 15) The practice occurs in all courses and is prevalent

throughout the school district from elementary through high school. (J.A. 16-17) There is no evidence in the record suggesting that "calling out" grades has any pedagogical value.

In some classes the students are compelled to exchange exams. (Record in the Tenth Circuit, Appellant App., pp.19-20) When the teacher announces the correct answers, the students put a grade on their fellow students' exam. (*Id.*, pp.19-20) Once the grading is accomplished, the teacher has the student "call out" his or her grade so that the teacher can record the grade in the grade book. (*Id.*) Even though some teachers permit a student to bring his or her grade to the teacher, not all teachers employ this practice. (*Id.*) Moreover, there is no policy that prohibits a teacher from compelling a student to orally "call out" his or her grade, even if the teacher allowed each student to grade his or her own test. (*Id.*)

Even though the Owasso School District has a district-wide custom of permitting this practice, not all teachers employ students to grade one another's work (J.A. 12; Record in the Tenth Circuit, Appellant App., pp. 15, 19, 93, 178-180). Consequently, there exist other alternatives to the practice of having students correct other students' papers and then compelling them to "call out" their grades as the teacher records the grade. (J.A. 12-13; Record in the Tenth Circuit, Appellant App., pp. 15, 93, 178-180)

The principal of an Owasso elementary school has her teachers either grade the exams, quizzes and homework themselves or, alternatively, requires that the individual student grade his or her own exams, quizzes or homework. (Record in the Tenth Circuit, Appellant App., p. 178) There

is no evidence that this particular elementary school assigns any less work or that the absence of this practice at this school has had any detrimental effect upon the children's education or their teachers' ability to educate. (*Id.*)

There are still other means by which teachers work efficiently and effectively without disclosing the confidential grades of their students. (Petition for Certiorari, App. A-28; 229 F.3d at 973) Some teachers simply direct the students to turn their tests over so the grade is not revealed. (Pet. App. A-29; 229 F.3d at 973) Other teachers also may have students come to retrieve the graded papers one at a time, so they do not see each others' grades, or fold over the papers to conceal the students' grades but not their names and, thus, allow a student to hand back the papers. (*Id.*)

Kristja J. Falvo is the mother of Elizabeth, Philip, and Erica Pletan, who all attend school at Owasso School District. (Record in the Tenth Circuit, Appellant App., pp.34-36) Falvo learned that a number of her children's teachers would have their students grade one another's exams and then would have the students "call out" their own grades to the teacher. (J.A. at 10)

Falvo's son Philip was, at that time, a special education student who was being "mainstreamed" by the Owasso School District. (Record in the Tenth Circuit, Appellant App., p. 39) During the 1997-98 and 1998-99 school years, Falvo complained about this grading practice to the Owasso administrators. (*Id.*, pp. 38, 39, 45, 47, 49) She claimed that this policy created an environment for ridicule and humiliation – especially at the middle school grade levels where the other children were ridiculing her son for the

grades he was receiving. (*Id.*, pp. 39-41). Owasso, however, failed to provide Falvo any opportunity to consent to the release of her children's grades. (*Id.*)

In October 1998, when Falvo's children were in the sixth, seventh, and eighth grades she brought a class action lawsuit pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983 alleging that the Owasso School District violated her right to consent to the release of the children's education records, namely the grades received on exams and other student work. (*Id.*, pp. 32-50).

Falvo subsequently moved the district court for a restraining order. The matter was heard on October 14, 1998, and the Court entered an order denying the requested relief. (*Id.*, pp. 18-26) Falvo then moved the court for certification of the class. Without a ruling on the class certification issue, on February 3, 1999 Falvo moved the district court for declaratory and summary judgment. (*Id.*, pp. 64-66) Owasso filed a cross-motion for summary judgment. (*Id.*, pp. 120-122) The district court concluded that the grading practice did not implicate any constitutionally protected privacy interest. (*Id.*, pp. 10-17) Additionally, the court ruled that the "grades" that students receive on exams were not "education records" under FERPA. (*Id.*, p. 14) The district court granted summary judgment in favor of defendants.

Falvo timely appealed the district court's judgment to the Tenth Circuit, asserting that the grading practice violated both the Fourteenth Amendment and FERPA. The Tenth Circuit affirmed the district on the Fourteenth Amendment claim but reversed on the FERPA claim. (Pet. App. A-32; 229 F.3d at 974)

A unanimous panel held that the grades being recorded on the students' exams are education records and, thus, the custom of releasing the grades without Falvo's consent violated her rights under FERPA. (Pet. App. A-28; 229 F.3d at 973) Based purely on the language of the statute itself, the Court of Appeals found that § 1232g(b)(1) prohibits an educational institution from maintaining a "policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students without the written consent of their parents" to anyone other than the designated authorities, which does not include other students. (Pet. App. A-17; 229 F.3d at 968).

The court explained that there is no dispute that the grades which students place on each other's papers and then report to the teacher "contain information directly related to a student." (Pet. App. A-21; 229 F.3d at 970) It further held that the language of the statute indicated that Congress intended the term "education records" to include grade books and that the grades being recorded by the teacher were necessarily being "maintained" by a person acting for the educational institution. (Pet. App. A-22; 229 F.3d at 970).

The Court of Appeals reversed the district court and remanded the case for further proceedings. After Petitioners' request for rehearing *en banc* was denied, they filed a petition for writ of certiorari. This Court granted certiorari. 121 S.Ct. 2547 (2001).

SUMMARY OF THE ARGUMENT

Because the grade book is clearly within the statutory text of "education records" and because § 1232g(b)(1) textually prohibits the release of "*information* contained therein," to interpret the statute to allow school districts to force their students to "exchange" or "call out" grades as the

teacher is recording the grade in the grade book clearly violates the parents' right to consent to the release of the grades. It is counterintuitive to construe a mandate so direct and clear as to find that the definition does not include "grades" recorded on exams, quizzes and other student work being recorded by the teacher.

Even the Department of Education, Family Policy Compliance Office ("FPCO") acknowledges that under FERPA, if a teacher discloses the grades being recorded in the gradebook without parental consent the disclosure violates FERPA. *Amicus Brief for the United States* at 15, fn.9[2] Indeed, the FPCO has consistently held that grades on exams and student work are "education records." *See*

[2] "Under FERPA, if a teacher discloses his or her grade book to someone other than a substitute, the grade book would then become an education record." *Ibid.* Likewise, the United States admits, "disclosure of a class roster listing grades from a teacher's grade book would violate FERPA because the disclosure would remove the grade book from the 'sole possession' exception of Section 1232g(a)(4)(B)(i) and such disclosure of education records is not authorized under FERPA." *Id. See* Lodging of Respondents, Letter to Ms. Barbara Goodwin (July 13, 1998), at 055 (teacher's grade book not a "sole possession record" because released to union officials); Letter to Dr. Curtis Culwell, Lubbock Independent School District (June 25, 1998), at 067 (announcement of names and grades of students passing test was unauthorized disclosure of education records); Letter to Mr. Larry Hollstein, San Juan Basin Area Vocational-Technical School (May 13, 1998), at 080 (grid sheet posted with levels of student achievement an education record); Letter to Dr. Richard Carpenter, Calhoun Community College (April 28, 1998), at 086 (grades in grade book improperly disclosed by failing to hide or redact when showing grades to individual students); Letter to Ms. Mary Beth Myers, Indiana University – Bloomington (July 24, 1995), at 097 (FERPA forbids posting student grades by name *or* social security number without consent).

Opinion Letters of Department of Education Family Policy Compliance Office cited at n. 2, *supra*.

Accordingly, because Congress intended that the grades being recorded in the teachers grade book were intended to be kept private and not released to anyone without parental consent, the Tenth Circuit's decision should be affirmed.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT IS IN HARMONY WITH THE PLAIN LANGUAGE AND PURPOSE OF THE FEDERAL STATUTE.

The Tenth Circuit's decision comports with the purposes and objectives Congress intended to achieve under the plain language of FERPA. The Tenth Circuit correctly held that:

> [Since] Congress intended FERPA to preclude a teacher from revealing to one student the grades of another student when written in a grade book, it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book.

Pet. App. A-25; 229 F.3d at 971. The Court limited its analysis to the "grades" on the student papers, and did not hold that the papers themselves were also FERPA records.

FERPA has two primary purposes: (1) granting parental *access of information* contained within a student's "education records," § 1232g(a)(1)(A), while at the same time (2) protecting parental *right to consent to disclosure* of that information to third parties. § 1232g(b)(1). The

legislative history reveals that Congress was quite concerned to assure parents and students that school district practices would "*not invade the privacy of students* or *pose any threat of psychological damage to them.*" *See* U.S. CODE CONG. & ADMIN. NEWS, at 4251 (1974) (Sen.Rep. No. 93-1026, 93rd Congs., 2nd Sess.187). It is designed to protect the rights of privacy of students and their parents and to give them access to "education records." (December 13, 1974 CONG. REC. 39859). "The proposed amendments define 'education records' in order to make clear what document and other material parents and students will have access to." *Id.* at 39858. "[P]arents and students should have access to *everything* in institutional records maintained for each student in the normal course of business and *used by the institution* in making decisions that affect the life of the student." *Id.* at 39858-39859 (emphasis added). While it is not necessary to look beyond the plain language of the statute, the legislative statements clearly lend support to the conclusion that the congressional intent was to fashion a broad definition of "education records" that would include "everything" that is "used by the institution."[8]

A. FERPA Requires Parental Consent

The Tenth Circuit correctly held that calling out or exchanging a student's test grade at the direction of a teacher

[8] The FPCO has recently held that "[t]his term is broadly defined to include all records which are directly related to a student and maintained by an educational agency or institution, or a party acting for such agency or institution. Thus, the location or manner in which an education record is maintained, such as whether or not it is placed in the student's cumulative file, does not affect its status as an education record... any record, such as a permanent records card, a student's homework assignment or exam, a teacher's grade book" are education records. Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Dr. Judith Fox, Byram Hills Central School District (June 12, 2001), Respondents' Lodging at 006.

for the purpose of recording the grade in the teacher grade book nullifies any safeguard afforded to a parent or student against prohibited disclosure. Pet. App. at A-23; 229 F.3d at 970. Not only has the grade been revealed to other students, it is inevitably revealed to the other students' parents. Thus, Owasso has violated FERPA by permitting its teachers to reveal Falvo's children's exam grades to other students without first obtaining her § 1232g(b)(1) consent.

The Supreme Court has long held that the interpretation of a statute designed to confer new benefits or rights upon a class of individuals, like FERPA, will "be entitled to a liberal construction to accomplish its beneficent purposes." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949). The express language of a statute is controlling, absent a clearly expressed legislative intention to the contrary. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This Court has said that it "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The plain language of FERPA prohibits educational institutions that receive federal funding from maintaining "a policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students *without the written consent of their parents*" to anyone other than statutorily-designated authorities, which does not include other students. 20 U.S.C. § 1232g(b)(1)(emphasis added).

The text of § 1232g(b)(1), prohibits the practice of calling out or exchanging grades without "parental consent." Indeed, the precise language of the text provides that a school district may not release education records or personally identifiable information of a minor student contained therein "*without the written consent of their*

parents." 20 U.S.C. 1232g(b)(1). There is no ambiguity in this provision. It is clear on its face. FERPA was created for the benefit and welfare of every parent and student. The Court of Appeals correctly explained that if the school district permits its teachers to engage in releasing the grade information, it simply must do so "anonymously or with the consent of parents." Pet. App. A-28, n. 13; 229 F.3d at 973, n. 13.

B. Grades Received By A Student On Exams, Quizzes And Other Work Are "Education Records"

FERPA further defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution." *Id.* § 1232g(a)(4)(A). Based purely on the textual language of the statute itself, the grades which students receive on their academic work, whether exams, quizzes or other materials and then report to the teacher for the purpose of recording in a grade book or some other record constitute "education records" under FERPA.[4] These grades which students receive on exams and then report to the teacher "contain information directly related to a student" and are being "maintained... by a person acting for [an educational]... institution." *Id.* § 1232g(a)(4)(A)(i) and (ii).

It is undisputed that students are directed by the teacher to either score one another's work or call out their own

4 The FPCO has held that "[c]learly the... grades received for [written reports and projects] are education records as that term is broadly defined. Letter from Dr. LeRoy S. Rooker, Director, Family Policy Compliance Office to Mr. Julio Almanza, Duluth Public Schools (January 28, 2000), Lodging of the Solicitor General, at p. 4.

grades specifically to enable the teacher to record the grade in the grade book. The grade books and the grades within are, therefore, necessarily "maintained" by the teacher. Thus, the teacher is "maintaining" these grades in a grade book or some other file. Because the grade book is clearly within the statutory text of "education records" and because § 1232g(b)(1) textually prohibits the release of "*information* contained therein," forcing students to "exchange" or "call out" exam grades as the teacher is recording the grade in the grade book clearly violates Falvo's right to consent under § 1232g(b)(1).

To suggest that the definition does not include "grades" recorded on exams, quizzes and other student work being recorded by the teacher is simply counterintuitive. It is difficult to imagine broader language.[5] "Assertions of ambiguity do not transform a clear statute into an ambiguous provision." *United States v. James*, 478 U.S. 597, 604-605 (1986). Indeed, in *Belanger v. Nashua, New Hampshire, Sch. Dist.*, 856 F.Supp. 40, 49 (Dist. N.H. 1994), the court explained:

> The change from the laundry list of items to the definition of "education records" as it appears today, along with the legislative history of the Amendment, lends support to the conclusion that

[5] The FPCO has held that "[t]his term is broadly defined to include virtually all records which are directly related to a student and maintained by an educational agency or institution, or a party acting for such agency or institution. Thus, the location or manner in which an education record is maintained, such as whether or not it is placed in the student's cumulative file, does not affect its status as an education record." Letter to Dr. Viji George, Concordia College (May 1, 2001), Lodging at 014.

> the *congressional intent was to fashion a "broad definition."*[6]

This "broad definition," coupled with an intuitive prudence necessarily finds that academic grades that are being used, collected and recorded by the school district or the teacher acting on its behalf fall clearly within the term "education records."

This is precisely why the FPCO held that the grades in the teacher's grade book are "educational records." Letter Opinion of Leroy S. Rooker, June 25, 1998, Lodging at 067. Consistent with the Tenth Circuit analysis the FPCO held that the grades contained in the "grade book" are subject to rights, privileges and obligations contained within the text of FERPA. *Id.*

Even though FERPA prohibits the release of personally identifiable information, it does explicitly identify certain information that *may* be released by the school district without first obtaining prior parental or student consent. This is identified in FERPA as "directory information." 20 U.S.C. § 1232g(a)(5)(A).

[6] For this reason, the FPCO has historically adhered to an expansive reading of the scope of education records protected by FERPA:

> [T]here is no support for a narrow and overly technical reading of the word "maintaining" to allow schools to create and use whole categories of records that are directly related to students but not made available for inspection and review because the school formally does not keep the records for "file purposes" or keeps them only for short periods of time and in a teacher's desk, folder, or briefcase.

Letter to William H. Burkhalter, Jr., Esq. (April 28, 1998), Lodging at 084.

"Education records" which may be released without prior parental consent include the following:

> the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A). Notably, the statutory list does *not* include students' test scores or grades. Thus, any personally identifiable information not listed as "directory information" shall not be disclosed, disseminated or revealed to anyone other than the student's parent or school officials.

Had Congress intended that test score grades being recorded and assessed by the teacher would be made public without parental consent it could have easily listed "exam grades" or "test scores" as "directory information." Congress, however, did not list "grades," "test scores" or "teacher ratings" of any kind in the list of directory information. Indeed, this Court has admonished that it is impermissible to create exceptions in addition to those specified by Congress. *United States v. Smith*, 499 U.S. 160, 166-167 (1991). *See, Consumer Prod. Safety Comm'n*, 447 U.S. at 108 ("If Congress had intended to exclude FOIA disclosures... it could easily have done so explicitly in this section as it did with respect to the other listed exceptions.")

Accordingly, Petitioners' suggestion that they ought to be permitted to release the grade information that is being recorded in the teacher grade book without first obtaining parental consent belies the textual exceptions identified in "directory information."

C. The Teacher Grade Book Is Not A "Sole Possession Record"

The term "education records" does not include records of instructional personnel "which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute...." *Id.* § 1232g(a)(4)(B)(i). Contrary to Petitioners' suggestion however, the teacher's grade book is not a "sole possession" record exempt from the privacy protection of FERPA. It is important to note that the Tenth Circuit correctly explained that "this language explicitly provides that records of instructional personnel, such as grade books, do not constitute 'education records' *only if* they 'are not accessible or revealed to any other person except a substitute.'" *Id.* Because the grades contained in the grade books in this case are necessarily revealed to parents and students (*e.g.* parent/teacher conferences), the grade books are not "sole possession" records, but rather "education records" as defined in § 1232g(a)(4)(A).

As the Court of Appeals correctly explained, "[i]f grade books never constitute 'education records,' teachers would be free under FERPA to reveal them to anyone, thus obviating the need to provide in the statute" the language, "and which are not accessible or revealed to any other person except a substitute." 229 F.3d at 970.

Even assuming, *arguendo*, that a grade book is construed as a "sole possession" record, such construction does not categorically exclude the grades contained therein. It is without doubt that § 1232g(a)(4)(B)(i) prohibits the teacher from disclosing personally identifiable information in a teacher's "sole possession" record. The text provides that the information shall "not [be] accessible or revealed to anyone other than a substitute." *Id.* Moreover, the FPCO holds that

FERPA protects the information contained in "sole possession" records because the text of the provision prohibits the release of the information.[7]

This construction is consistent with the FPCO's letter opinion dated June 25, 1998, wherein the FPCO held that "a teacher's grade book does not meet the "sole possession" record exception under FERPA."[8]

It is, therefore, the Petitioners' construction, not the Tenth Circuit, that renders superfluous the "sole possession"

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[7] "[A]s with education records, personally identifiable information contained in sole possession records may not be disclosed to third parties without prior written consent." Letter from Dr. LeRoy S. Rooker, Director, Family Policy Compliance Office to Mr. Julio Almanza, Duluth Public Schools (January 28, 2000), Lodging of the Solicitor General, at p. 6.

[8] Consistent with the Tenth Circuit's analysis, the FPCO held that the grades contained in the "grade book" are subject to rights, privileges and obligations contained within the text of FERPA. Indeed, the FPCO found that the "sole possession" exception is strictly construed to mean "memory jogger" type of information. "For example, the exception includes information that a school official uses as personal reference tool and, thus, is generally maintained by the school official unbeknownst to other individuals." Thus, the FPCO has drawn a distinction between "sole possession" notes and an "education record." The FPCO held that the grades in the teacher's grade book are "educational records." Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office to Mr. Andrew Marko, Wyoming Valley West School District (June 25, 1998), Lodging of the Solicitor General, at p. 2.

records exception. Thus, it would be implausible to consider the grade book within the meaning of "sole possession" records, and at the same time permit "access" to the information of every child's grade information on the grounds that the "sole possession" records are not "education records." Such textual construction would not be consistent with the purpose of keeping private the "grades" being recorded by the teacher in the grade book. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Accordingly, the teacher grade books, and the grades therein, are FERPA records.

Owasso's argument is further undermined by its own written FERPA policy. Record in the Tenth Circuit, Appellee App., pp. 157-158. The Owasso FERPA policy provides, in part, that "sole possession" records are not "education records" only if they meet the following three criteria.

> (1) It was made as a personal memory aid;
> (2) It is in the personal possession of the individual who made it; and
> (3) *Information contained in it has never been revealed or made available to any other person except the maker's temporary substitute.*

As does § 1232g(a)(4)(B)(i), subsection (3) of the Owasso policy clearly mandates that a teacher cannot reveal the "information" to anyone other than a substitute. In fact, the school district policy specifically states that in order to qualify as a sole possession record "it must *never* have been

revealed or made available" to any other person except the substitute. Thus, Petitioners' own legal interpretation of FERPA specifically provides that the "information" must *never have been revealed* to anyone.

D. Petitioners' Additional Contentions Provide No Assistance to Their Position

Petitioners alternatively suggest that the "right to a hearing" provision in § 1232g(a)(2) would seemingly allow a student to challenge the grade he or she received from the teacher on every exam, quiz or homework assignment if the grade being recorded in the grade book is an education record. However, the legislative comment, upon which Petitioners' rely, actually confines § 1232g(a)(2) to only allow a hearing for an *incorrectly transcribed* grade, *not* to challenge the grade actually given in the student's performance. 120 CONG. REC. 39,862 (1974). Thus, if a teacher had incorrectly recorded a test grade in the grade book, a parent or student would simply be entitled to a hearing to determine if the grade given was the actual grade recorded.

The Tenth Circuit did not suggest that the hearing process can be used to challenge the fairness of the grade or the teacher's grading standards on student tests or homework, but only that the accuracy of the grade being recorded in the grade book itself.

Indeed, such inaccuracies in grading are presumably resolved informally thousands of times a year for thousands of students across the country. Petitioners' fears and speculation that every student would somehow have a right to hearing to change a grade on every test are simply unfounded and exaggerated. Indeed, courts should exercise

great wariness in the construction of statutes where their meaning is sought to be derived, not from specific language, but out of the innuendoes and hypothetical consequences in other portions of the statute. *Palmer v. Massachusetts*, 308 U.S. 79, 83-84 (1939).

If there was any doubt or ambiguity as to Congress' intent of § 1232g(a)(2), then the legislative comment in the Joint Statement removes it. Since all contingencies cannot be envisioned, courts have generally found it wiser to delay passing upon the validity of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. *Watson v. Buck*, 313 U.S. 387, 402 (1941).

Petitioners also suggest that the defined term "education records" if it included student grades would prohibit a central custodian from maintaining an access record under § 1232g(b)(4)(A). Petitioners Brief at 25. Such speculation is likewise unavailing. Nothing in the Tenth Circuit's interpretation of the term "education records" would prohibit a central custodian from maintaining the access logs. The Court of Appeals correctly explained that the access log requests can still be maintained by each school district centrally. In any event, access logs are required only for nonconsensual disclosures to certain persons outside the school system, and can be viewed only by parents, record custodians, and other education authorities for audit and evaluation purposes. 20 U.S.C. § 1232g(b)(4)(A).

Subsection 1232g(b)(4)(A) specifically states that the custodian could be a "school official and his assistants." Obviously, the custodian contemplated by Congress could be any "school official" or anyone deemed an assistant to a "school official." That this provision somehow prohibits a

finding that student grades are "education records" offers nothing of real assistance to the issue presented.

Assuming, *arguendo,* that only those grades held by the "central custodian" are "education records," a teacher would be free to disclose or disseminate final course grades prior to turning the course grades into the "central custodian" since the final course grade was not yet maintained by the "central custodian." Such a result is an absurdity. "It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

II. The Tenth Circuit Correctly Rejected the FPCO's Informal Letter Opinion Under *Chevron, Skidmore* and *Christensen*

The Tenth Circuit properly rejected the district court's deference to a 1993 FPCO informal letter opinion under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and *Christensen v. Harris County*, 529 U.S. 576, 585 (2000). The Court of Appeals rejected the Rooker letter for two reasons. First, the Court of Appeals found the meaning of the term "education records" was clear from the statute itself. Pet. App. A-18; 229 F.3d at 969. The language of FERPA plainly and unambiguously articulated Congressional intent to provide parents the right to consent to release of their children's grades. Pet. App. A-19; 229 F.3d at 970. A court may only defer to an agency's interpretation if a statute is deemed ambiguous under *Chevron,* 467 U.S. at 842-44 (deference granted only when there is an ambiguity and, only then, when the agency's interpretation is reasonable). Second, the Tenth Circuit explained that,

> even if the relevant statutory language was ambiguous, the Supreme Court recently announced that *Chevron* deference does not extend to an interpretation contained in an opinion letter issued by the administering agency under *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000)

Pet. App. A-19; 229 F.3d at 969. Additionally, the Court of Appeals held that the Rooker letter would carry minimal persuasive power under *Skidmore* since the letter contained a disclaimer that the FPCO had *not thoroughly* considered the issue before the court. The letter contained the following:

> Because you do not fully explain the details surrounding the activities you identify, *it would not be appropriate for this Office to comment on* whether the District's participation in the activities would violate rights afforded parents by FERPA.

Pet. App. A-20; 229 F.3d at 970; Record in the Tenth Circuit, Appellant App., p. 157-159.

Generally, Rooker explains that an educational agency is "prohibited by FERPA from publishing or posting the grades of students if personally identifiable." Yet, illogically, he concludes that FERPA would not prohibit the practice of a student "calling out" his or her grade as the teacher is recording the grade in the grade book.

Nowhere in the letter does Rooker once mention or refer to any agency ruling, investigation, public commentary, or case authority that would support this conjecture. Indeed, Rooker himself deems the letter a "general discussion." Rooker had not received into evidence any testimony of the actual harm and ridicule the practice of disclosing grades might implicate. Hence, the issue was not presented to the

agency, and the agency did not have jurisdiction to rule on the issue. The issue was left unresolved by the administering agency. He specifically stated that he could not rule one way or the other on the question presented since it was *not appropriate.* The letter appears to be nothing more than a memorialization of a telephone conversation between a union inquirer and Rooker.

The1993 letter is internally inconsistent with the notion of keeping confidential grades that are being recorded in the grade book. On the one hand, Rooker explains that an educational agency is prohibited by FERPA from publishing or posting the exam grades of students *if it is done in a personally identifiable manner.* Yet, on the other hand, Rooker states that "FERPA" would not prohibit teachers from having their students call out that grade in class.

Not only is this interpretation internally inconsistent, the conclusion is an unreasonable construction of § 1232g (b)(1). The calling out of grades in the classroom circumvents the teacher's §1232g(b)(1) obligation to protect the "grade" information being recorded in the grade book. In fact, the FPCO's December 20, 1996 letter opinion specifically held that "grades" on interim tests, quizzes and other student generated work were not to be disclosed to other students without parental or student written consent. Such later opinion undermines Petitioners' present reliance or Rooker's earlier 1993 opinion.

Even assuming, *arguendo*, that there existed some ambiguity with respect to § 1232g(b)(1), the Tenth Circuit correctly held that the agency's interpretation was unreasonable and inconsistent with the primary intent and purpose of FERPA. The Court of Appeals found the Rooker letter was "bereft of any reasoning underlying the rather conclusory opinion that grades written down by other

students and announced to the teacher are not maintained" by the school district. The Rooker letter ignored the broad language of the term "education records," the narrow term defining "directory information," and the stated purpose of FERPA to prohibit the release of confidential grade information.

Accordingly, the Tenth Circuit correctly rejected the FPCO's informal letter opinion under *Chevron, Skidmore,* and *Christensen.*

III. RECENT FPCO OPINIONS FIND THAT GRADES ON EXAMS, QUIZZES AND OTHER STUDENT WORK ARE "EDUCATION RECORDS" SUBJECT TO THE PRIVILEGES AND RIGHTS AFFORDED PARENTS AND STUDENTS UNDER § 1232g(B)(1)

The FPCO letter opinions find that (i) the teacher "grade book" is not a "sole possession" record, and, (ii) grades on exams, quizzes and other student work were protected as "education records."[9] Thus, the FPCO's most recent letter

[9] This 1993 letter opinion was the only FPCO letter opinion submitted by Petitioners to the district court. At no time during the district court proceedings, nor during the appellate court proceedings, did Dr. Rooker or the Petitioners disclose any other FPCO letter opinions. The *amicus* brief of the United States revealed that Rooker had in fact written at least three other letter opinions that shed light on the subject matter of the issue presented to both the district court and the Tenth Circuit. Brief of the United States at 28. Most egregiously, the United States now retreats from the FPCO's position in all of the letter opinions and even retreats from its *amicus* brief filed in this Court at the Petition stage.

Recently disclosed FPCO opinion letters dating back to 1988 reveal that it has been the consistent and unwavering policy of the DOE to interpret the phrase "education records" in the broadest possible sense, to include many types of information not maintained

in a central register. *See* Lodging: Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Macomb Community College (August 8, 2001), at 002 (student letter complaining of professor an education record even if personal information redacted); Letter to Dr. Judith Fox, Byram Hills Central School District (June 12, 2001), at 004 (student's Early Intervention Program file kept by teacher an education record; "the location or manner in which an education record is maintained, such as whether or not it is placed in the student's cumulative file, does not affect its status as an education record"); Letter to Dr. Gary M. Chesley, Bethel Board of Education (May 1, 2001), at 008 (records kept by faculty regarding student evaluations for National Honor Society admission were education records); Letter to Dr. Viji George, Concordia College (May 1, 2001), at 011 (professor's notes of student teaching evaluation disclosed verbally at meeting were education records not subject to "memory jogger" sole possession record exception); Letter to Mr. David Killips, Reed City Area Public Schools (April 2, 2001), at 015 (confidential memo regarding student taken from teacher's desk and copied by another student was education record); Letter to Mr. Robert Grueser, Warren School District (March 9, 2001), at 017 (student's threatening note and information about student disclosed to parents of other students were education records); Letter to Attorney at Law, Pittsburgh, PA (February 1, 2001), at 023 (voice mail message from parent regarding child's placement an education record); Letter to Mr. Bernard Lomman, South Eastern School District (November 17, 2000), at 026 (National Honor Society comments); Letter to Hon. James L. Oberstar, House of Representatives (March 31, 2000), at 029 (test papers considered education records once collected); Letter to Hon. Phil Gramm, United States Senate (April 5, 1999), at 031 (notes from parent-teacher conference education record); Letter to Unnamed Inquirer (December 17, 1998), at 033 (test papers considered education records once collected); Letter to Dr. Eulene Locke, Putnam County School District (December 9, 1998), at 035 (teacher maintained forms containing record of student behavior education record); Letter to Dr. Joe B. Wyatt, Vanderbilt University (October 5, 1998), at 038 (grade on a group oral presentation held an education record); Letter to Dr. Joseph Bonita, Bellefonte School District (October 5, 1998), at 041 (coach's log re participation on softball team an education

opinions undermine the Petitioners' suggestion that the exam grades are not FERPA records. More importantly, these additional FPCO letters support the Tenth Circuit's decision by finding that an educational institution cannot, under any circumstance, release grades that are being recorded by the teacher to any person other than the student or parent unless the parent has provided written consent.

For example, a student attending the State University of New York, College at Oneonta alleged that the school had violated FERPA when it disclosed his test grades without his prior written consent. Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office to Dr. Alan

record); Letter to Dr. James L. Auter, Metropolitan School District of Martinsville (October 2, 1998), at 045 (teacher notes to principal regarding student, student exams and homework assignments that have not been returned are education records); Letter to Mr. Joseph Coleman, LaFayette Central School District (August 7, 1998), at 048 (National Honor Society evaluations); Letter to Tamara Walker Sieckmann, Esq., for Mesa Unified School District #4 (August 4, 1998), at 052 (same); Letter to Mr. Tony Sorci, Fort Bragg Unified School District (June 29, 1998), at 063 (teacher survey of student feelings about individual student was unauthorized disclosure of education record of that student); Letter to Dr. Cornelius Van Cain, Camp Hill School District (June 11, 1998), at 070 (National Honor Society ballots); Letter to Dr. James L. Auter, Metropolitan School District of Martinsville (May 13, 1998), at 74 (original documentation of disciplinary incidents was education record); Letter to William H. Burkhalter, Jr., Esq. (April 28, 1998), at 082 (teacher evaluation for cheerleader position education record); Letter to Dr. Joseph Brooks, Superintendent, Aiken County School District (April 27, 1998), at 089 (teacher evaluation for cheerleader position); Letter from Steven N. Schatken, Director, Office of Management, United States Department of Education, to Mr. Phil Baum, Executive Director, American Jewish Congress (April 13, 1998), at 095 (letter from parent to school officials concerning programs or activities for child an education record).

Donovan, State University of New York, College at Oneonta (December 20, 1996), Lodging of the Solicitor, p. 1. More specifically, the student alleged that during the entire semester, the professor would leave his graded papers, tests and projects uncovered in a public area. *Id.* The student alleged that this was this particular teacher's chosen method of returning graded work *Id.* The tests were left in an area that would allow anyone to review his test grades. *Id.*

The FPCO explained that under FERPA a school may generally disclose student information only after the student has provided written consent. *Id.* The FPCO held that, "[the student's] "grades" he received on class work, are education records as that term is broadly defined under FERPA." *Id.* The FPCO further admonished that FERPA vests the right to consent with the student. *Id.* Even the student's inaction by acquiescence was not sufficient to meet FERPA consent. *Id.*

The foregoing FPCO letters do support the Tenth Circuit's decision by finding that an educational institution cannot, under any circumstance, release grades that are being recorded by the teacher to any person without written consent.

IV. THE LEGAL OBLIGATION TO KEEP GRADES PRIVATE NECESSARILY PROHIBITS RELEASING THE GRADES WHILE COLLECTING THEM

In *Whalen v. Roe*, this Court held that the state had an inherent duty to avoid careless disclosure of confidential medical information during the collection phase. 429 U.S. 589, 602-606 (1977). There the state statute authorized the health officials to collect and gather names of prescription drug users. *Id.* A patient contended that the disclosure of the information to health officials violated his right to privacy.

Id. The patient, however, proffered no evidence of actual disclosure to any person other than state officials. *Id.* This Court held that the disclosure to health officials could not be said to be impermissible disclosure since the information was not disseminated to anyone *other than officials*. *Id.* Thus, the officials were obligated to keep private the information during the "gathering" and "collection" phases. *Id. Cf. Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000) (recognizing fundamental right of confidentiality of personal medical records); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) ("A right to conceal one's medical history is readily derivable from the branch of the tort of invasion of privacy that protects people against the indiscriminate publicizing of intimate details of their personal lives"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577-80 (3d Cir. 1980).

In view of *Whalen* and its progeny, it would be clearly impermissible for a doctor to gather his patients together in a room for the sole purpose of having them "call out" each patient's personal medical information while his nurse records the information into a medical record.[10] Such result

[10] "The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law." Current Opinions of the Council on Ethical and Judicial Affairs, E-5.05 (Issued December 1983; updated June 1994). The AMA Board of Trustees has affirmed that "Disclosures of information about a patient to a third party may only be made upon consent by the patient or the patient's lawfully authorized nominee, *except in those cases in which the third party has a legal or predetermined right to gain access* to such information." Current Opinions of the Council on Ethical and Judicial Affairs, H-140.989(7), "Informed Consent and Decision-Making in Health Care," Board of Trustees Report NN, A-87

would be absurd. Indeed, the only permissible way this could be accomplished would be to have each patient give written consent to participate in such a practice.

Likewise, it would be clearly impermissible to allow a United States Census Bureau worker to have all residents of a neighborhood meet at a set time and place for the purpose of collecting personal information for the sake of convenience and efficiency, and require that everyone assembled "call out" their social security numbers, past years salary information, and other personal information. Such an act would clearly violate any rights of confidentiality a citizen would have in the information that is being collected by the census worker. *See* 13 U.S.C. § 9 (2001) (census information to be kept confidential and restricted to use for statistical purposes); 13 U.S.C. § 214 (2001) (penalties for wrongful disclosure of confidential census information by census worker); *United States v. Little*, 321 F.Supp. 388 (D. Del. 1971).[11]

(reaffirmed, Sunset Report, I-97)(emphasis added).

[11] Several federal and state statutes specifically create rights of privacy. Seventeen states have enacted privacy statutes, although not all of these statutes extend protection to personal information (most regulate use of a person's name or likeness). *See* J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 6.8 (2d ed.). While no Supreme Court case examines the issue of whether federal privacy statutes extend to forbidding the collector of the information from disclosing the information, several federal statutes have language which specifically precludes agents of federal agencies from disclosing confidential information. *See id.* at § 5.81. The Privacy Act of 1974 prohibits federal agencies from disclosing private records and requires the agencies to "establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for

Yet, these examples are precisely what the Petitioners suggest FERPA provides. Such a suggestion does not advance the overriding purpose and intent of FERPA's prohibition against release of personally identifiable grade information without written parental consent. The Tenth Circuit's decision necessarily imposes the legal obligation that a teacher must keep private and confidential each student's grade during the collection stage.

V. THE TENTH CIRCUIT'S DECISION HAS NO NEGATIVE CONSEQUENCES

The Tenth Circuit clearly explained that its decision need not have negative policy consequences. The Court went out of its way to assure the school districts that "if" they wanted to continue "calling out" grades that they could continue this practice "if done anonymously or with the consent of parents." Pet. App. A-28, n. 13; 229 F.3d at 973. Thus, there were endless and, arguably "longer-standing," means of achieving the claimed educational benefits without eliminating the practice. "There necessarily exist further alternatives to the practice of having students correct other students' papers without parental consent or anonymity." *Id.*

Indeed, the Oklahoma Education Association president, Carolyn Crowder, explained that this ruling would not "really change the way teachers teach." And, the teachers will "continue to use good sense in protecting students'

noncompliance." 5 U.S.C. § 552a(e)(9). The Internal Revenue Code provides that tax returns are confidential, and may not be disclosed by any "officer or employee" (or former officer or employee). 26 U.S.C. § 6103 (2001). The Financial Right to Privacy Act, 12 U.S.C. § 3401 *et seq.* (2001), prohibits a government authority from having access to financial records. Government authority is defined as "any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C. § 3401.

privacy."[12] The teacher could grade her own papers. And, if she wished to return them to students with a minimum of work, she could have students hand out the graded papers in a sealed envelop or folded over to cover the grade, or could have students approach the teacher individually to receive their own papers. Artwork may still be displayed without a name or grade attached. Even the Petitioners' concede that with student identification or exam numbers, teachers could collect student papers, shuffle them, and hand them out for peer grading.

There simply exists no evidence, and the school district has failed to present any record evidence, that would demonstrate that the Owasso teachers were not able to meet their daily, semester or year-end curriculum objectives if they complied with the Tenth Circuit decision by either grading anonymously or providing parental consent. The Court of Appeals' decision, taken together with the undisputed evidence in the record, demonstrates that Owasso and its teachers could easily modify its grading practices with little or no burden to the school district, the teachers or the students. Since the record in this case establishes that other teachers and school districts are able to meet the same curriculum objectives without disclosing students' grades, Petitioners' fear that the decision will disrupt a significant educational practice is neither supported by the facts nor the law of this case.

Even District Judge Kern doubted whether "the grading method under review could not undergo modification while still properly educating students." Record in the Tenth

[12] Kurt, *Grading Lawsuit Ruling Expected to Bring Warning for Teachers,* Shawnee-News-Star Online, Tuesday, August 1, 2000.

Circuit, Appellant's App., p. 15. The district court stated that it would be hard-pressed to find that this grading practice is supported by any compelling school district interest. *Id.* Judge Kern explained that "the record reflects that many teachers, even in this immediate geographical area, do not employ the student grading method." *Id.*

Moreover, the testimony of the teachers that they were willing to allow students to grade their own papers and then bring their own papers up to the front of the class is compelling. Record in the Tenth Circuit, Appellee's App., p. 127. Logically all students could be given and exercise this option. Thus, the fact that all students could grade their own papers and come forward with their own grade, belies the school district's protestations that teachers cannot possibly meet their curriculum objectives.

Petitioners' concern of not being able to disclose honors and awards is resolved by the statutory grant of authority to release such student awards as provided in the "directory information." Section 1232g(a)(5)(A) specifically allows the release of student award information.

With regard to the "immediate feedback" the Court held that this could be accomplished if the students were allowed to grade their own papers and tests. Indeed, such exercise is more "immediate" than having a peer grade one's work. In fact, scoring someone else's paper delays feedback and focuses attention on someone else's understanding, not on one's own. Thus, if the purpose is to provide immediate feedback, certainly the best way is to provide it directly to the test taker.

Accordingly, the Petitioners' protestations that the Tenth Circuit opinion "somehow marks the end of the world for

teachers" are far exaggerated. Pet. App. A-29, n. 13; 229 F.3d at 973.

CONCLUSION

Congress has spoken with clarity to the precise question raised by this case. The practice of exchanging papers and then calling out the grades unlawfully circumvents the purpose of safeguarding the students' personal grade information. The Tenth Circuit and the District Court correctly found that there exist reasonable alternatives that would pose no onerous burden on the school district or the teachers. While it was not necessary to look beyond the plain meaning of the statutory language in determining what constitutes "education records," the foregoing analysis coupled with the Court of Appeals' decision supports the conclusion that Congress intended to fashion a broad definition of "education records" to include student grades being recorded and maintained in the teacher's grade book. This Court should affirm the Court of Appeals' decision, because it clearly and unequivocally comports with the purposes and structure Congress intended to achieve.

Respectfully submitted,

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In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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The American Heritage Dictionary of the English Language (4th ed. 2000) 3

Daniel R. Dinger, *Johnny Saw my Test Score, so I'm Suing my Teacher: Falvo v. Owasso Independent School District, Peer Grading, and a Student's Right to Privacy under the Family Education Rights and Privacy Act*, 30 JOURNAL OF LAW & EDUCATION 575 (October 2001) 15, 16, 17, 18, 19

Perry A. Zirkel, *A D-Grading Experience?*, PHI DELTA KAPPAN, November 2000, at 253 18

1. Congress Did Not Grant a Private Right of Action to Enforce FERPA Pursuant to 42 U.S.C. § 1983.

Respondent points out that the question of whether Respondent could bring an action against Petitioners under 42 U.S.C. § 1983 was not raised in the question presented in the Petition for Certiorari and was not addressed in the Brief for Petitioners. Respondent therefore urges that such issue should not be addressed by the Court. Brief of Respondents on the Merits, p. 2. Respondent then devotes the next seven (7) pages of her brief to arguing that the Court should rule that FERPA *is* actionable under 42 U.S.C. § 1983. *Id.*, pp. 2-8.

Petitioners acknowledge that their focus throughout this litigation has been on the merits of Respondent's FERPA claim and not on the availability of a remedy under Section 1983. However, as the issue of whether FERPA is enforceable under Section 1983 has been fully briefed by *Amici* supporting Petitioners the National School Boards Association, *et al.*, The National Education Association and the American Federation of Teachers, AFL-CIO, and The Reporters Committee for Freedom of the Press and the Student Press Law Center, and as Respondent and *Amicus* supporting Respondent Eagle Forum Education & Legal Defense Fund have likewise briefed the question, the Court should determine this issue.

This Court has on a number of occasions considered and ruled on issues that were not raised in the petition for certiorari "because the issues were so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented." *Kolstad v.*

American Dental Assn., 527 U.S. 526, 540 (1999), *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991) (Stevens, J., dissenting) (citing cases). The Court has addressed issues not specifically raised in the petition for certiorari not only when the parties have briefed the issue, *Oklahoma Tax Comm. v. Potawatomi Tribe*, 498 U.S. 505, 512 (1991), but also when the issue has been raised only by an *amicus*. *Teague v. Lane*, 489 U.S. 288, 300 (1989).

Because both the parties and their *amici* have raised and addressed this issue, and because this issue is "fairly subsumed" within the question on which this Court granted certiorari, the Court should also determine whether Congress, in enacting FERPA, established a right of action enforceable under 42 U.S.C. § 1983.

2. FERPA Was Intended to Apply Only to Institutional Records and Not to the Scores Recorded on Routine Homework Papers, Quizzes, and Tests.

FERPA was intended to apply only to institutional records, especially those records that follow a student through his or her educational career and might affect the student's employment or post-secondary school educational opportunities. FERPA was never intended to interfere with the way in which teachers conduct day-to-day classroom activities. As the four Tenth Circuit judges who dissented from the denial of Petitioners' petition for rehearing *en banc* correctly observed, "[d]efining 'education records' to include 'grades which students record on one another's homework and test papers and then report to the teacher' . . . is a vast expansion of the actual words

of the statute, and [is] unsupported by the legislative history." (Petition for Certiorari, App. D-2-3).

A. The Text of the Statute.

The plain language of the statute reflects that Congress did not intend for the scores recorded on routine homework papers, quizzes, and tests to be protected as "education records" under FERPA. In defining education records as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are *maintained* by an educational agency or institution or by a person acting for such agency or institution," 20 U.S.C. § 1232g(a)(4)(A) (emphasis added), Congress clearly intended the word "maintained" to supply a substantive component to the definition. Based on the plain meaning of the word "maintain" ("to keep in an existing state; preserve or retain," *The American Heritage Dictionary of the English Language* (4th ed. 2000)), Congress was limiting "education records" to those "records, files, documents, and other materials" that are *kept*, *preserved*, or *retained* by an educational agency or institution. The most logical way to give effect to this limitation is by applying FERPA only to the *institutional records* of an educational agency or institution.

The Tenth Circuit rejected this analysis, concluding that because *at least some* of the scores on peer-graded homework papers, quizzes, and tests are ultimately recorded in the teacher's grade book, those scores are "maintained" once they are recorded in the teacher's grade book. (Petition for Certiorari, App. A-21). But because the record establishes that the disclosure of the

score on a peer-graded paper occurs *before* the teacher ever records the scores in a grade book, the lower court was forced to take its analysis one step further and find that scores are maintained "at the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers." (*Id.* at A-24). The court concluded that such peer-graded scores are education records even if the score is never recorded in the teacher's grade book. (*Id.* at A-24, n.11).

Significantly, Respondent makes no attempt to defend the second step of this analysis. Instead, Respondent focuses exclusively on the grades that get recorded in the grade book and appears to concede – directly contrary to the Tenth Circuit's decision – that peer-graded student work is *not* an education record if the score thereon is not recorded in the teacher's grade book. Brief of Respondents on the Merits, p. 18. *Amici* Council of Counseling Psychology Training Programs, *et al.*, expressly acknowledge this point, stating at p. 18 of their brief that "FERPA is violated only if the teacher, without parental consent, shares the *grade book information* about one child with someone not eligible to receive it." (Emphasis added).[1]

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[1] It seems indisputable that the mere fact that other students may have knowledge of information contained in a student's education records will *not* result in a violation of FERPA unless the information was disclosed *from the education records* and did not come from another source. Otherwise, FERPA would be violated when students see a classmate commit a serious violation of the school's disciplinary code and accurately conclude, based on that student's absence from school the following day, that he has been suspended. In that

By conceding that scores are not "maintained" within the meaning of FERPA unless they are ultimately recorded in a teacher's grade book, Respondent essentially adopts a position akin to that formerly taken by the Family Policy Compliance Office.[2] Because the FPCO expressly concluded, even under its previous, broader interpretation of "education records," that the peer-grading practice at issue in this case did not violate FERPA, Respondent's last-minute shift toward the FPCO's former position is puzzling, to say the least.[3]

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situation, the suspended student's education records do, in fact, reflect that he has been suspended, but *the source* of his classmates' knowledge of that information was clearly *not* the suspended student's education records. By the same token, the disclosure of grades on homework papers that ultimately may be recorded in a teacher's grade book does not violate FERPA, because the disclosure comes *from the homework paper* rather than *from the teacher's grade book.*

[2] The United States has noted in this case that the FPCO had previously expressed the view that "education records" includes student work *after* it has been collected by the teacher. The United States recognized that such position is overly broad and is not supported by the text or legislative history of the statute. Brief for the United States as Amicus Curiae Supporting Petitioners, p. 11, n.6.

[3] In addition to changing her legal theory, Respondent also attempts to revise the undisputed facts on which summary judgment was granted. Respondent repeatedly emphasizes that some students revealed their scores to the entire class by "calling out" their scores instead of reporting the scores in confidence. Respondent asserts that "calling out" grades in this manner has no pedagogical value. Brief of Respondents on the Merits, p. 9. Yet the Tenth Circuit expressly acknowledged that it did not even reach the method of reporting the grades because a disclosure occurs at the earlier stage when one student grades

Moreover, by focusing solely on scores that end up in the teacher's grade book, Respondent illustrates a second flaw in the lower court's analysis: no "disclosure" of an education record occurs when one student grades another's paper if neither student knows whether the score placed on such paper is actually recorded in the grade book. Suppose a teacher assigns a 10 point homework paper for each day of the week and, through peer grading, the following five scores by one student are "revealed" to his classmates in one week: 8, 9, 10, 7, and 8. Assume the teacher records only two of the five daily grades in her grade book and the class does not know

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the work of another. (Petition for Certiorari, App. A-21, n.10). The court stated:

> [Falvo] testified that the calling out of her children's grades did not really matter because the prior act of one student grading another's paper itself constitutes a disclosure. As a consequence, this court need not determine whether the challenge to the practice of calling out grades in class is resolved by the option which the School District provided to Falvo's children to privately report their own grades to the teacher.

(*Id.* at A-3-4, n.2). Respondent also repeatedly refers to the peer grading of "exams," even though it is undisputed that no teacher at the Owasso School District utilizes peer grading to score semester exams or mid-semester (9-weeks) tests. (J.A. 33). Finally, Respondent characterizes Philip Pletan as "a special education student who was being 'mainstreamed.' " Brief of Respondents on the Merits, p. 10. In fact, the record establishes that the only special education service Philip received was 45 minutes of speech therapy once a week, and that was discontinued with Respondent's consent prior to the end of Philip's seventh grade year. (Record in the Tenth Circuit, Aplee. Supp. App. pp. 148-51, 328).

which two daily grades are recorded.[4] If the teacher records the 9 and 10 point scores, the teacher's grade book will reflect a percentage for the week for that student of ninety-five percent (95%), an "A" average. But if the teacher records the 7 and 8 point scores, the grade book will reflect a percentage of seventy-five percent (75%), a "C" average. In this situation (which the undisputed facts show to be perfectly consistent with the practices of teachers at the Owasso School District), the use of peer grading has *not* resulted in any disclosure of the contents of the teacher's grade book, because it is impossible for the class to know whether the teacher's grade book shows this student to have an "A" average, a "B" average, or a "C" average.[5] Moreover, suppose the

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[4] As was pointed out at pp. 5-6 of the Brief for Petitioners, Respondent testified that she didn't know if it was possible to know, without actually being able to look at the teacher's grade book as the teacher recorded the scores, which scores get recorded in the grade book and which scores do not. (J.A. 14).

[5] Certainly, there will occasionally be a student who consistently scores in the same range from day to day and, by virtue of such consistency, enables his classmates to predict with accuracy his percentage or grade recorded in the teacher's grade book. But it cannot be plausibly suggested that Congress enacted FERPA with the goal of addressing that anomalous situation. Such a conclusion would force federal courts presented with a FERPA claim to examine the daily grading practices of teachers and perform mathematical calculations concerning the number of peer-graded homework, quiz, and test scores recorded by the teacher to determine if the plaintiff student's classmates could actually determine the correct grade or average as recorded in the teacher's grade book. Congress did not enact FERPA to burden federal courts with the task of overseeing and second guessing the day-to-day operations of our nation's classrooms.

teacher varies her practice from week to week, recording more daily grades in some weeks and fewer in others? Because no student knows the actual contents of the teacher's grade book, there is simply no *disclosure* in such a situation.

The same analysis shows why a teacher's grade book is excluded from the definition of education records by 20 U.S.C. § 1232g(a)(4)(B)(i) as records of instructional personnel "which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." As Respondent acknowledges, the Tenth Circuit's conclusion that grade books are not sole possession records was based solely on that court's assumption that "the grades contained in the grade books in this case are necessarily revealed to parents and students" through the practice of peer grading. Brief of Respondents on the Merits, p. 21. That factual assumption simply cannot be supported based on the record of this case. Because peer grading does *not* automatically result in the disclosure of the contents of a teacher's grade book, the fact that a teacher utilizes peer grading does not prevent the teacher's grade book from being a sole possession notes record excluded from the definition of education records by subpart (a)(4)(B)(i).

Respondent also fails to explain why Congress would have taxed schools with the onerous requirement of conducting a formal due process hearing to allow a parent to challenge the correctness of a score recorded on a 10 point homework paper if such score will have absolutely no impact on the student's ultimate grade in the course. Rather than attempt to justify such an indefensible result, Respondent misstates Petitioners' argument with regard

to the hearing right granted by 20 U.S.C. § 1232g(a)(2). Respondent characterizes Petitioners' argument as suggesting that subpart (a)(2) would "allow a student to challenge the grade he or she received from the teacher on every exam, quiz or homework assignment. . . . " Brief of Respondents on the Merits, p. 24. Respondent then asserts that the hearing granted by 20 U.S.C. § 1232g(a)(2) does not permit a hearing "to challenge the grade actually given in (sic) the student's performance." *Id.* Yet Petitioners made clear at p. 21 of their brief that they are not making the argument Respondent asserts. Rather, Petitioners question why Congress would grant a parent the right to a due process hearing to challenge the score on a 10 point math paper or spelling test that was correctly marked to indicate the student got only one answer wrong but was mistakenly recorded as crediting the student with only 8 points rather than his or her actual score of 9 points. It is absurd to suggest that Congress intended the hearing right of subpart (a)(2) to apply in such a situation. Yet Congress' use of the term "education records" in 20 U.S.C. § 1232g(a)(2) permits only one result. Either Congress did intend to grant parents the right to a due process hearing to challenge the score recorded on routine homework papers, or the Tenth Circuit interpreted "education records" far more broadly than Congress intended. Respondent's attempt to sidestep this issue rather than fairly deal with it illustrates the weakness of Respondent's position.

Respondent also fails adequately to address Petitioners' argument regarding the obligation imposed by 20 U.S.C. § 1232g(b)(4)(A) to maintain an access record of all individuals, agencies, or organizations which have

"requested or obtained access to student's education records." Respondent asserts that "[n]othing in the Tenth Circuit's interpretation of the term 'education records' would prohibit a central custodian from maintaining the access logs." Brief of Respondents on the Merits, p. 25. Yet as Petitioners noted at pp. 24-25 of their brief, subpart (b)(4)(A) expressly requires a record of access to be kept "with the education records of each student." If, as the Tenth Circuit held, the myriad routine student papers that come across a teacher's desk each day are "education records," then every teacher is the custodian of those records and has the obligation under subpart (b)(4)(A) to maintain an access record. Nothing in the text or legislative history of FERPA suggests that Congress ever contemplated burdening every teacher in the nation with this record-keeping requirement.

B. The Legislative History.

Respondent's reliance on the legislative history of FERPA is even more unavailing. Respondent contends that the Tenth Circuit's decision "comports with the purposes and objectives Congress intended to achieve" in enacting FERPA. Brief of Respondents on the Merits, p. 14. As support for this interpretation, Respondent quotes the following language from a statement by Senator McIntyre of New Hampshire regarding his understanding of the meaning of the term "education records" in FERPA:

> I would understand that intent to be that, except as provided in the definition, parents and students should have access to everything *in the institutional records* maintained for each student in the normal course of business and used by

> the institution in making decisions that affect the life of the student.

120 Cong. Rec. 39,858-39,859 (1974) (emphasis added). Senator Pell, Chairman of the Educational Subcommittee and co-sponsor of the Buckley/Pell Amendment that changed FERPA's definition of "education records" to its present form, concurred in this statement. *Id.* at 39,859.

Contrary to Respondent's suggestion, this quote refutes Respondent's arguments and shows that Congress clearly intended that FERPA apply *only* to institutional records maintained in an educational agency or institution's central records repository. More to the point, Congress simply did not intend FERPA to address the occasional embarrassment and hurt feelings that are an unpleasant but unavoidable concomitant to a child's attending school and interacting with child peers on a daily basis. Rather, the legislative history shows repeatedly that Congress was concerned only with the institutional records that follow a student and have the potential to negatively affect the student's future, particularly in connection with subsequent academic and employment opportunities.

Shortly after FERPA was enacted, the statute was amended to insert the definition of "education records" currently in effect. In the Joint Statement in Explanation of the Buckley/Pell Amendment that was placed in the Congressional Record, Senators Buckley and Pell made the following comments:

> In addition, the material subject to challenge is defined generically as "education records," eliminating the long list of illustrative examples contained in existing law. "Education records"

> are described as those records, files, documents, and other materials directly related to a student which are maintained by a school or by one of its agents. This definition is a key element in the amendment. An individual should be able to know, review, and challenge all information – with certain limited exceptions – that an institution keeps on him, *particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution.*

120 Cong. Rec. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment) (emphasis added).

From the time the bill that would become FERPA was introduced in the spring of 1974, Congress' concern and focus was on *institutional records,* because it is those records that have the potential to adversely affect a student's educational and career opportunities. As Senator Buckley stated in explaining the need for a federal law guaranteeing parents the right of access to their children's education records:

> When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student.

120 Cong. Rec. 14,580 (1974).

Congressman Jack Kemp of New York expressed similar thoughts in remarks made in the House of Representatives about the kind of harm with which Congress was concerned:

> [T]here is growing concern about the potential abuse and improper disclosure of information now maintained and used by the public and private school systems throughout the country – extensive information on the social and economic background, attitudes and behavior, performance and ability, and health of pupils within those systems. . . .
>
> *Because the information stored in these elaborate systems follows the student as he or she goes through the learning process, from one teacher to another, from one school to another, often from one school system to another,* and because this information is subjective and involves the most sensitive of data which can be ascertained about an individual, we must come to grips with the potential abuses which can arise from the disclosure of this information. In many, if not most instances, *this information is available to such diverse entities as the military services, actual or potential employers, and institutions of higher learning.*

120 Cong. Rec. 9,633 (1974) (emphasis added).

It is difficult to imagine any circumstance in which the score on a 10 point homework paper could have "devastatingly negative effects on the academic future and job prospects" of a student, the concern specifically addressed by Senator Buckley. Likewise, it is hard to understand how Congress could have been concerned about the scores on routine homework papers, quizzes, and tests following a student from school to school and being made available to the military services, actual or potential employers, or institutions of higher learning.

FERPA was intended to govern only those institutional records that follow a student through his or her

educational career and might have an adverse impact on the student's subsequent educational or employment opportunities. The Tenth Circuit's analysis expands FERPA far beyond what was contemplated by Congress. The Tenth Circuit's decision should be reversed.

3. The Analysis of the Tenth Circuit Needlessly Burdens Legitimate Educational Practices in Ways Never Intended by Congress.

Citing *Belanger v. Nashua, New Hampshire, Sch. Dist.*, 856 F. Supp. 40, 49 (D. N.H. 1994), Respondent argues that the Buckley/Pell Amendment, which did away with the "laundry list" of representative "education records" in favor of the current definition of the term, reflects a Congressional intent to fashion a "broad definition" of education records. Brief of Respondents on the Merits, pp. 18-19.[6] Yet after urging this Court to adopt this "broad definition" of education records, Respondent sanguinely asserts that adopting the Tenth Circuit's analysis would have no negative consequences for education.[7] *Id.* at 35.

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[6] Respondent ignores the comment from the Joint Statement in Explanation of the Buckley/Pell Amendment in which Senators Buckley and Pell state that the hearing right of 20 U.S.C. § 1232g(a)(2) was intended only to provide a procedure "to challenge the accuracy of institutional records. . . . " 120 Cong. Rec. 39,862 (1974).

[7] The breadth of the definition Respondent asks this Court to approve and the fallacy of Respondent's assurance that education will not be negatively impacted thereby are both illustrated by the fact that under FERPA, students are not granted a right of access to their *own* education records until they reach the age of 18 or are enrolled in an institution of post-

Surprisingly, Respondent does not attempt to refute Petitioners' suggestion that the Tenth Circuit's analysis would result in a FERPA violation every time a teacher corrects personally-identifiable student work done at a chalkboard in a classroom. *Amicus* Eagle Forum Education & Legal Defense Fund does address this situation, however, and argues that personally-identifiable student

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secondary education. 20 U.S.C. § 1232g(d). Thus, under the plain language of FERPA, a student under the age of 18 may access his or her permanent transcript and the IQ tests, standardized test scores, and other materials maintained in the student's cumulative folder *only* if his or her parent consents. Accordingly, if routine homework papers, quizzes, and tests are "education records" protected by FERPA, a teacher could not return graded student work to the student without first obtaining parental permission to do so. "As students are not listed as persons who can access education records without parental permission . . . schools will certainly need that permission in order to pass various assignments and tests back to the student." Dinger, *Johnny Saw my Test Score, so I'm Suing my Teacher: Falvo v. Owasso Independent School District, Peer Grading, and a Student's Right to Privacy under the Family Education Rights and Privacy Act*, 30 JOURNAL OF LAW & EDUCATION 575, 599 (October, 2001). Given the concerns about psychological harm and self esteem voiced by *Amici* Council of Counseling Psychology Training Programs, *et al.*, it is certainly plausible to assume that some parents might choose not to subject their children to the embarrassment and humiliation of learning that he or she made a "C" or "D" on a homework paper, test, or report card. Under the analysis urged by Respondent and her *Amici*, a parent could effectively foreclose a teacher from returning *any* graded materials to a student. Congress cannot possibly have intended this result. If a teacher cannot reveal to a student that student's own mistakes, how is the teacher to instruct that student?

work on a chalkboard that a teacher has publicly corrected is not "maintained" because it is erased. Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Respondent, p. 12. This position flies in the face of the Tenth Circuit's conclusion that a peer-graded homework paper is "maintained" by the student who scores the paper, regardless of whether the score thereon is ever recorded in the teacher's grade book.

Eagle Forum E&LDF also asserts that the Tenth Circuit's analysis will have no effect upon team grades, in-class presentations, or display of science projects and art work. *Id.* Yet Eagle Forum E&LDF offers nothing to support this argument beyond its own conclusory statement.

Commentators who have written about the Tenth Circuit's decision do not agree that the Tenth Circuit's analysis will not have a significant and adverse impact on legitimate educational practices. A thorough discussion of the problems generated by the lower court's decision is found in an article by Daniel R. Dinger in the October, 2001 issue of the *Journal of Law and Education*. Mr. Dinger notes that the negative effects of the lower court's decision include "an increased burden on teachers coupled with fewer opportunities for students to learn." Dinger, *Johnny Saw my Test Score, so I'm Suing my Teacher: Falvo v. Owasso Independent School District, Peer Grading, and a Student's Right to Privacy under the Family Education Rights and Privacy Act*, 30 JOURNAL OF LAW & EDUCATION 575 (October, 2001). Quoting a Salt Lake City, Utah, newspaper editorial, Mr. Dinger observes:

> "There are sound, practical reasons that public school students grade one another's classroom assignments and tests. Peer review can help

> budding writers improve their mastery of the language. In math classes, peer grading might help a struggling student better understand a problem solving strategy. [And] it can curb cheating." Others feel that "[p]eer corrections provide immediate feedback and help students immediately fix errors instead of repeating them until the teacher gets a chance to correct simple daily assignments." Clearly some will argue that when students are not permitted to correct other students' tests and papers, they will miss out on these important learning opportunities.

Another negative effect on student learning that may potentially result from the *Falvo* decision is that, as a result of the overburdening of teachers, students will be given fewer assignments, and therefore fewer opportunities to apply what they have learned. For example, at least one teacher has suggested that "the ruling could lead teachers to revert to less rigorous, scannable, multiple-choice tests or assign less work in order to get through it all."

> *Id.* at 597-98 (footnotes omitted).

Mr. Dinger also suggests that Respondent's blithe assurance that teachers may continue to utilize peer grading by obtaining parental consent or utilizing anonymous codes is misplaced:

> [W]hat if one or two parents sharing Kristja Falvo's concerns choose not to sign the permission slip? What should teachers do then? In such a case, a teacher would most likely have to abandon peer grading altogether, devise and maintain a code system, or run a dual grading system in which one or two students' papers are graded in some way different from the rest of

> the class. And to protect those students who do not participate in peer grading from possible ostracism, she would have to do so in a way that prevents other students from finding out who is and who is not participating in peer grading. . . . Creating codes for each student such that papers can be anonymously graded will likely result in similar administrative difficulties as, at the very least, a teacher will have to go through the process of assigning undecipherable code names or number to each student and afterwards work to make sure that students do not find out other students' code names or numbers.

Id. at 596-97. Professor Perry A. Zirkel, Iacocca Professor of Education at Lehigh University, has expressed similar concerns about the administrative burdens of implementing a system of anonymous peer grading or obtaining parental consent. Zirkel, *A D-Grading Experience?*, PHI DELTA KAPPAN, November 2000, p. 253.

Finally, Mr. Dinger notes that "perhaps the most significant effect of *Falvo* is the fact that the decision subjects teachers and administrators to potential lawsuits when one student by accident or otherwise views another student's grades." Dinger, *Johnny Saw my Test Score*, 30 JOURNAL OF LAW & EDUCATION at 596. Mr. Dinger correctly observes that the effect of the Tenth Circuit's decision was to make it "clearly established" law within the Tenth Circuit that FERPA protects the confidentiality of routine school work, thus depriving teachers and administrators in all such future cases of the defense of qualified immunity. Should this Court adopt the analysis of the Tenth Circuit, the result will be the same all across

the nation. As Mr. Dinger cautioned, teachers and administrators would be compelled "to watch every move they make in the classroom lest some student sees another's paper and a lawsuit is subsequently filed." *Id.* at 600.

The analysis of the lower court, if adopted by this Court, will unquestionably result in the *federalization* of education in the guise of protecting student privacy rights under FERPA. Federal courts will be asked to evaluate and oversee the daily activities in the classrooms of our nation's schools – both public and private – notwithstanding this Court's repeated warning that educational policy decisions are best left to local educational professionals.[8]

The appropriateness of peer grading is precisely the kind of issue that should be left to local educational decisionmakers to determine. As *Amici* National Education Association and the American Federation of Teachers, AFL-CIO observe in their *Amicus* brief supporting Petitioners, the practice of peer grading is not universally embraced by all teachers and all school districts: that is precisely the point. "The question of whether to engage in this practice – and, if so, when and to what extent – is uniquely suited to local resolution by teachers and school districts on a case-by-case basis." Brief for the

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[8] "By and large, public education in our Nation is committed to the control of the State and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members. . . . " *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

National Education Association and the American Federation of Teachers, AFL-CIO as Amici Curiae Supporting Petitioners, p. 11.

In enacting FERPA, Congress did not intend to take this quintessentially local decision out of the hands of education officials who are responsive to the local voters. The decision of the Tenth Circuit is wrong and should be reversed.

CONCLUSION

For the reasons set forth in this brief, the Brief for Petitioners, and the briefs of the *Amici* supporting Petitioners, Petitioners request that this Court reverse the decision of the United States Court of Appeals for the Tenth Circuit and reinstate the summary judgment granted by the district court.

Respectfully submitted,

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No. 00-1073

In the Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, AKA OWASSO PUBLIC SCHOOLS, ET AL., PETITIONERS

v.

KRISTJA J. FALVO, PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN AND ERICA PLETAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999), prohibits the furnishing of federal funds to an educational institution that has a policy or practice of releasing, without parental consent, students' "education records," which are defined by FERPA as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A). The question presented is:

Whether allowing students to grade each other's homework and tests as their teacher goes over the correct answers aloud in class violates FERPA's prohibition against the release of "education records."

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In the Supreme Court of the United States

No. 00-1073

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, AKA OWASSO PUBLIC SCHOOLS, ET AL., PETITIONERS

v.

KRISTJA J. FALVO, PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN AND ERICA PLETAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This suit was filed by respondent, the parent of three students in the petitioner school district, alleging that petitioners violated the prohibition against release of her children's "education records" under the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(f). FERPA applies to schools and educational agencies that receive financial assistance under federal education programs administered by the Secretary of Education. FERPA directs the Secretary of Education to "take appropriate actions to enforce" FERPA and to investigate, review, and adjudicate alleged violations of the statute. 20 U.S.C. 1232g(g). At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. *Statutory framework*

In 1974, Congress enacted the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999) to provide parents with access to their children's "education records" and to protect the children's rights of privacy by limiting the release of such records without parental consent.[1] FERPA requires schools and educational agencies to comply with its requirements as a condition to receiving financial assistance under federal education programs administered by the Secretary of Education. See 20 U.S.C. 1232g(a)(3); 34 C.F.R. 99.1.

FERPA first provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in [20 U.S.C. 1232g(a)(5)[2]]) of students without the written consent of their parents," except in certain statutorily specified circumstances. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); see also 20 U.S.C. 1232g(b)(2). The statute allows release of "education records," without parental consent, to other teachers and school officials who have been determined by the institution to have legitimate educational interests, officials of other schools in which the student seeks to enroll, certain state and federal educational and law enforcement officials, persons

[1] In the case of a student who has reached age 18 or "is attending an institution of postsecondary education," the rights accorded by FERPA belong to the student rather than the parents. See 20 U.S.C. 1232g(d).

[2] "[D]irectory information" includes such information as the student's name, address, date and place of birth, major field of study, participation in officially recognized activities and sports, dates of attendance, and degrees and awards received. 20 U.S.C. 1232g(a)(5); 34 C.F.R. 99.3.

designated in a subpoena for law enforcement purposes, victims of certain crimes at a postsecondary institution, and educational testing, financial aid, and accrediting organizations. 20 U.S.C. 1232g(b)(1)(A)-(J) (1994 & Supp. V 1999); 20 U.S.C. 1232g(b)(6)(A) (Supp. V 1999). The institution must "maintain a record, kept with the education records of each student," that identifies each organization, agency, and individual (except other school officials, including teachers of the same school or local education agency) that requests or obtains access to the education records and specification of their legitimate interest in obtaining such information. 20 U.S.C. 1232g(b)(4)(A); see 34 C.F.R. 99.32.

FERPA also requires a school to make "education records" of students available to their parents for inspection and review. Thus, FERPA specifies that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution . . . the right to inspect and review the education records of their children." 20 U.S.C. 1232g(a)(1)(A); see also 20 U.S.C. 1232g(a)(1)(B) (applying inspection and review requirements to State educational agencies).

Finally, schools that receive federal financial assistance under federal education programs administered by the Secretary of Education must also provide parents an opportunity to challenge the accuracy of their child's "education records." Parents must be afforded a hearing "to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a

written explanation of the parents respecting the content of such records." 20 U.S.C. 1232g(a)(2).

The term "education records" is defined by FERPA to mean:

> those records, files, documents, and other materials which–
>
> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. 1232g(a)(4)(A). FERPA excludes from that definition several specific categories of records. The first exception is for "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. 1232g(a)(4)(B)(i). Other exceptions cover certain law enforcement, employment, and medical records. 20 U.S.C. 1232g(a)(4)(B)(ii) - (iv).

2. *Factual and procedural background.*

a. Respondent Kristja Falvo is the mother of three children who are enrolled in petitioner Owasso Independent School District No. I-011, in a suburb of Tulsa, Oklahoma. During the 1997-1998 and 1998-1999 school years, respondent objected to the practice of teachers in her children's classes having students grade one another's homework and tests while the teacher went over the correct answers in class and, after the students received back their own papers, having the students call out their grades to the teacher. Pet. App. A3, B2. Respondent complained about the practice to school counselors and to the school district superintendent, claiming that it "severely embarrassed her children by

allowing other students to learn their grades." *Id.* at A3. Respondent was informed that her children had the option of reporting their grades to the teacher confidentially, but the school district declined to prohibit the student grading of schoolwork. *Id.* at A3-A4.

b. In October 1998, respondent filed the instant action in the United States District Court for the Northern District of Oklahoma, under 42 U.S.C. 1983 (1994 & Supp. V 1999). She alleged that the challenged grading practice violated FERPA and sought damages and declaratory and injunctive relief against the Owasso School District and various school and school district officials. Pet. App. A4.

The district court, ruling on cross-motions for summary judgment, entered judgment for petitioners. Pet. App. B1-B6.[3] The district court held that allowing a student to grade the paper of another student and to have students call out their grades in class does not violate FERPA. *Id.* at B2-B4. The court relied (*id.* at B2-B3) on the Department of Education's interpretation of FERPA set forth in a letter dated July 15, 1993, from the Department's Family Policy Compliance Office (see *id.* at F3-F6) that FERPA does not prohibit the practices at issue here. The court noted that the Department of Education is the agency charged with enforcing FERPA, see 20 U.S.C. 1232g(f) and, as such, its interpretation of the statute "is entitled to deference if it is

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[3] On October 16, 1998, in an order denying respondent's request for a temporary restraining order, the court stated that, for purposes of that motion, it was following the holdings of two other circuits that a plaintiff may bring a FERPA claim under 42 U.S.C. 1983 (1994 & Supp. V 1999). See Pet. App. C4 (citing *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986); *Tarka* v. *Cunningham*, 917 F.2d 890 (5th Cir. 1990)). Petitioners did not raise that issue on appeal, but the court of appeals addressed the issue sua sponte and reached the same conclusion as the district court. Pet. App. A10-A16. Petitioners did not seek review of that ruling in their certiorari petition.

reasonable and not in conflict with the expressed intent of Congress." Pet. App. B3 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)). The court rejected respondent's contention that it should adopt the definition of "maintain" in the Privacy Act of 1974, 5 U.S.C. 552a(a)(3), which includes "collect," "use," and "disseminate" material. The court emphasized that Congress did not choose to incorporate that special definition into FERPA. The court instead construed "maintain" in accordance with its ordinary meaning of "preserve" or "retain" and held that the Department of Education's interpretation of FERPA was reasonable in light of that construction and did not conflict with the expressed intent of Congress. Pet. App. B4.[4]

c. The court of appeals reversed the judgment of the district court on the FERPA claim. The court first concluded that the terms "education records" and "maintain" are "clear from the statute itself" and that deference therefore was not due the Department of Education's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Pet. App. A18-A19. The court further held that, in any event, *Chevron* deference was not owed to that interpretation because it was contained in an opinion letter. *Id.* at A19 (citing *Christensen* v. *Harris County*, 529 U.S. 576, 586-587 (2000)). The court recognized that such an interpretive letter is "'entitled to respect' under * * * *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)," but the court found the letter to have minimal persuasive power under *Skidmore*. *Id.* at A19-A20.

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[4] The district court also rejected respondent's contention that the grading practices violated the Fourteenth Amendment, holding that a student's "interim tests and homework assignments" "are not 'highly personal' matters worthy of constitutional protection." Pet. App. B5. The court of appeals affirmed that ruling, *id.* at A6-A10, and it is not at issue here.

Turning to its own analysis of the statutory terms, the court stated that the only disagreement was over whether the grades placed by one student on the paper of another are "maintained . . . by a person acting for [an educational] agency or institution," for purposes of the second element of the statutory definition of the term "education records." 20 U.S.C. 1232g(a)(4)(A)(ii). Pet. App. A21. The court noted that at least some of the grades that are reported to the teacher are then recorded in the teacher's grade book. The court concluded that the grades become education records at least at that time because, in its view, a teacher's grade book and the grades it contains are "maintained . . . by a person acting for" an educational institution and therefore are "education records." Pet. App. A21-A24. The court then concluded that the grades are also "maintained . . . by a person acting for" the school, and therefore are "education records," even at what the court acknowledged to be "the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers." *Id.* at A24. The court reasoned that when one student writes the grade of another student on the homework or test, the correcting student is a "person acting for [an educational] agency or institution." *Ibid.* (quoting 20 U.S.C. 1232g(a)(4)(A)(ii)). And the court held that the student is "maintain-[ing]" the grade by marking the homework or test paper, "because the student is preserving the grade until the time it is reported to the teacher for further use." *Ibid.*

The court rejected petitioners' submission that other provisions of FERPA demonstrate that Congress did not intend to include in the definition of "education records" the student grading of other students' work under the auspices of an individual teacher. Pet. App. A25-A26. Petitioners argued that a broad definition of "education records" that includes student work graded by another student is inconsistent with the statutory requirement that educational institutions pro-

vide parents with a right to a hearing to challenge education records, 20 U.S.C. 1232g(a)(2), and maintain a record of all persons who have requested or obtained access to a student's education records, 20 U.S.C. 1232g(b)(4)(A). The court explained that "Congress could have sensibly intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers," Pet. App. A26, and that schools could continue the practice of having a central custodian keep records of who was granted access even though such papers remain under the individual teacher's classroom supervision, *id.* at A27-A28.[5]

d. On October 4, 2000, the court entered an order denying petitioners' petition for rehearing and suggestion for en banc review. Pet. App. D1-D6.

Four judges dissented from the denial of rehearing en banc. Pet. App. D2-D6. Those judges questioned how grades on individual student papers could be education records when, in their view, even a teacher's grade book is normally not an education record, except in limited circumstances. *Ibid.* They also expressed the view that it "seem[s] impossible, if not implausible," that a school must provide the right to a hearing to challenge each of the "thousands of grades a student might receive over time" and maintain a record of access to each such grade. Pet. App. D5. (citing 120 Cong. Rec. 39,862 (1974)).

SUMMARY OF ARGUMENT

A. The definition of "education records" in FERPA is most naturally read as referring to records that are retained or preserved as institutional records, but not student homework or classroom work. Several features of the statutory

[5] The court of appeals held that the individual petitioners were entitled to qualified immunity from liability for money damages because it was not clearly established that the challenged grading practice violated FERPA. Pet. App. A2-A3; A29-A32.

definition—its use of the terms "records," "maintained," and "educational agency or institution or * * * person acting for such agency or institution"—demonstrate that Congress addressed FERPA to records that are maintained as an *institutional* matter by school officials. Student work like the homework and classroom tests at issue in this case are typically not kept by the teacher, let alone maintained as a school record. The fact that a particular classroom practice may disclose a grade given on a particular homework or classroom assignment does not mean that the practice violates FERPA. FERPA does not invalidate such common and longstanding teaching methods.

B. The structure of the Act also demonstrates that student homework and classroom work are not included in FERPA's definition of "education records." The Act's requirement that schools maintain a record of persons who have sought or obtained access to education records, and the interest of those persons in such information, confirms that student work is not covered. That section refers to "the school official and his assistants who are responsible for the custody of such records," thereby addressing records that are maintained on an institutional basis, not student work that teachers have in their separate classrooms. 20 U.S.C. 1232g(b)(4)(A). Also, if student homework were considered to be education records under FERPA, the Act's requirement that schools afford parents the right to inspect homework and classroom work, as well as a right to challenge the content of such papers, would have constituted a major departure from ordinary education practices. There is no indication that Congress intended such a change. That result also would be contrary to the manifest congressional intent that parents not be granted a right to challenge the substance of the grades given a student, but only "the accuracy of institutional records which record the grade which was actually given." 120 Cong. Rec. 39,862 (1974) (Joint

Statement of sponsors of amendment that added definition of "education records"). Moreover, FERPA's overall focus on policies and practices of educational agencies and institutions indicates that Congress did not intend to interfere with the varying pedagogical judgments made by individual teachers regarding the handling and use of homework and other student work in the classroom.

C. The statutory history of FERPA confirms that Congress intended that the Act apply to institutional records, not student work. As originally enacted, FERPA did not use the term "education records," but instead used three different descriptions to identify the materials that were subject to the three provisions regarding parental access, the right to a hearing, and the prohibition against release without parental consent. The most expansive description referred to "official records," including the material "incorporated into each student's cumulative record folder." Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 572. Congress subsequently enacted the definition of "education records" and inserted that term in place of the earlier descriptions of covered records. The statements on the floor of both the Senate and the House, as well as the Conference Reports, relating to FERPA both as originally enacted, and as amended by the insertion of the term "education records," all refer to "institutional records," "school records," and similar descriptions of the records at issue, but not to student homework or classroom work. Likewise, the concerns identified in the legislative record before Congress demonstrate that FERPA was addressed to institutional records, not student homework and classroom assignments.

ARGUMENT

"EDUCATION RECORDS" COVERED BY THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT CONSIST OF DOCUMENTS RETAINED OR PRESERVED AS INSTITUTIONAL RECORDS, NOT STUDENT HOMEWORK OR CLASSROOM WORK

The term "education records" in FERPA, 20 U.S.C. 1232g(a)(4)(A), refers to materials that are preserved or retained by an educational agency or institution, or someone acting for such agency or institution, as an institutional or official record of a student. That term does not include student work that is created, used, or kept in the classroom and is not made part of a student's institutional record. FERPA therefore does not prohibit such common and long-standing classroom practices as students' grading other students' homework or classroom work or students' calling out their grades in class on homework and classroom work. That conclusion is supported by the text of the statutory definition of "education records," numerous other provisions of FERPA that use the term "education records" or are otherwise worded in a way that refers to institutional records, FERPA's statutory history, and the legislative record before Congress.[6]

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[6] Although the Department of Education previously has expressed a view of "education records" that includes student work once it is collected by the teacher (see note 17, *infra*), we have concluded, on the basis of our review of the relevant statutory materials, as discussed below, that FERPA does not reach student work unless they are maintained as institutional records of the school.

A. FERPA's Definition Of "Education Records" Is Most Naturally Read As Referring To Records That Are Retained Or Preserved As Institutional Records

1. FERPA defines "education records" as the "records, files, documents, and other materials" containing information related to a student that "are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A)(i) and (ii). See App., *infra*, 3a-4a.[7] By defining the statute's scope in terms of records "maintained" by "an educational agency or institution," or by "a person acting for such agency or institution," Congress addressed FERPA to records that are maintained, as an *institutional* matter, by school officials, and that therefore are of some lasting significance outside the classroom. By contrast, the definition's text is not naturally read to encompass materials that are handled by numerous individual teachers as part of the ongoing educational process in their separate classrooms. It follows that the homework and classroom assignments of students are outside FERPA's focus on institutional records.

Other features of the statutory definition point in the same direction. The list of items in the definition—"records, files, documents, and other materials"—connote in this setting the school's *documentation* of a student's performance, not the actual performance (*i.e.*, the student's work product, such as homework and classroom assignments) itself. The word "record" means "evidence, knowledge, or information remaining in permanent form"; "an account in writing or print * * * or in some other permanent form * * * intended to perpetuate a knowledge of acts or

[7] Section 1232g of Title 20 of the United States Code is reproduced in full, as now in effect as amended by the Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, Div. B, Tit. VI, §1601(d), 114 Stat. 1538, at App., *infra*, 1a-15a.

events"; or "something that serves to record." *Webster's Third New International Dictionary* (*Webster's*) 1898 (1993) (defs. 1c(1) and (2), 2). The words "files" and "documents" are naturally associated with institutional records but not with a student's homework, classroom assignments, artwork, and the like.

The final term in the definition—"materials"—is a generic term that should be understood to take its basic content from the other words in the series. See *Norfolk & W. Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991) (discussing the maxim "*ejusdem generis*," which indicates that "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration"); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (explaining that the maxim "*noscitur a sociis*," which means that "a word is known by the company it keeps," "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress"). Thus, the term "materials," read in this context and in light of standard tools of statutory construction, should be read to refer to data of a nature similar to "records," "files," and "documents," although the term presumably was intended to be expansive in identifying the *form* such records may take (*e.g.*, data stored permanently on computers on behalf of the institution). See 40 Fed. Reg. 1211 (1975) (explaining that, under FERPA, the "term 'record' is defined broadly to include all information and data maintained on a student in any medium").

That conclusion is further reinforced by the ordinary meaning of "maintain," which is "to keep in existence or continuance; preserve; retain." *Random House Dictionary of the English Language* 1160 (2d ed. 1987); see also *Webster's* 1362 (maintain: "1: to keep in a state of repair, efficiency, or validity: preserve from failure or decline"). FERPA's use of

the term "maintained"—in conjunction with "records," "files," "documents," and "institution"—in the definition of "education records" thus further supports an interpretation that refers to the official or permanent records that are retained by an institution, not student work that is handled by other students or the teacher or that is kept by the teacher in the classroom.

2. Under this interpretation of the statutory definition, FERPA applies, for example, to final course grades, student grade point averages, standardized test scores, attendance records, intelligence tests, psychological tests, aptitude and vocational tests, counseling records, career assessments, health and family history records, records of disciplinary proceedings and actions, and individualized education plans, because they are part of the institutional record of the student. FERPA does not, however, apply to the handling of the work product of students themselves, such as routine homework assignments or tests and other classroom activities, or to regulate or interfere with the ability of a school or teacher to carry out educational activities and functions.

The student homework and classroom tests at issue in this case, like many other assignments, often are not kept even by the teacher. Instead, such work is often returned to the students (or their parents), although actual practices may vary widely. For example, a teacher may have possession of student work (for reviewing or grading) before returning it to a student; a teacher may have other students grade student work; or a teacher may grade and keep student work in a file to review it with parents at a conference or to help the student or teacher assess the student's progress over the course of the school year. In none of those instances is the teacher "maintaining" "records," however, because the teacher does not retain or preserve the student work on a more permanent basis. *A fortiori* the teacher's possession of the student work at various times during the school year

does not constitute "maintaining" of the work as a documentation of the student's performance by the *institution*.[8]

The fact that a particular classroom practice may disclose a grade given on a particular homework or classroom assignment does not mean that the practice violates FERPA. Many educational practices inevitably reveal aspects of a student's academic abilities and are weighed as a part of a student's final course evaluation, including, for example, the public display of science projects, the posting of a classroom chart that records the number of books read by each student throughout the school year, students' handing back graded homework and classroom assignments, and teachers' posting of homework or classroom assignments. FERPA does not invalidate such common and longstanding teaching methods.[9]

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[8] Of course, if student homework and classroom work were, in fact, maintained as part of the institutional records of the school, they would be education records. For example, if a copy of a student's work is placed in a school's cumulative file concerning the student as an example of academic performance, that copy would be an education record. Or, if a school's final evaluation of a student in an art course consisted of a portfolio of selected pieces of the student's work and that portfolio was retained in the institution's records about the student, those pieces, too, would be education records. This case, however, does not involve such a practice.

[9] The court of appeals erred in assuming (Pet. App. A21-A24) that a teacher's grade book is an education record under FERPA. FERPA excludes from the definition of "education records" the records of instructional personnel that are in the "sole possession of the maker thereof" and are "not accessible or revealed to any other person except a substitute." 20 U.S.C. 1232g(a)(4)(B)(i). That exception applies to teacher grade books that are revealed only in the limited manner it allows, which presumably would include most teacher grade books. See 120 Cong. Rec. 39,862 (1974) (describing statutory exception for "[t]he private notes and other materials, such as a teacher's daily record book, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aides").

Under FERPA, if a teacher discloses his or her grade book to someone other than a substitute, the grade book would then become an education record. The teacher's disclosure of the grade book would not violate

B. The Structure Of FERPA Confirms That The Term "Education Records" Means Institutional Records, Not Student Homework Or Classroom Work

1. The meaning of "education records" as revealed in several respects by the statutory definition of that term is reinforced by a number of other provisions of the Act. The first is the provision that requires educational agencies and institutions to maintain a record of the individuals and entities (other than certain officials and teachers in the same school or school district) who request or obtain access to a student's "education records maintained by such educational agency or institution," 20 U.S.C. 1232g(b)(4)(A), thus reiterating the focus on *institutional* records, not classroom work. In addition, that section directs that the access records, which are to be "kept with the education records of each student," may be made available only to parents, school auditors, and *"the school official and his assistants who are responsible for the custody of such records."* *Ibid.* (emphasis added). By describing a "school official" and "his assistants" as the personnel responsible for the custody of education records, Section 1232g(b)(4)(A) underscores that "education records" means those records that are maintained on an institutional basis, not student work that individual teachers may have in their separate classrooms.

FERPA, however, if it was made to another school official or teacher of the same school or school district who has been determined by the institution "to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required." 20 U.S.C. 1232g(b)(1)(A) (allowing disclosure, without parental consent, of education records to such officials and teachers). By contrast, disclosure of a class roster listing grades from a teacher's grade book would violate FERPA because the disclosure would remove the grade book from the "sole possession" exception of Section 1232g(a)(4)(B)(i) and such disclosure of education records is not authorized under FERPA.

2. The structure of FERPA's provisions regarding parental inspection, hearings, and correction of records also demonstrate that Congress could not have intended for FERPA to apply to student homework and classroom assignments. The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release without parental consent, but also that parents have a right to inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert a written explanation by the parents regarding the content of the records. 20 U.S.C. 1232g(a)(1)(A) and (2). In addition, as discussed above, a school must maintain a record of those who request or obtain access to an education record. 20 U.S.C. 1232g(b)(4)(A); 34 C.F.R. 99.32.

That FERPA grants such extensive procedural rights strongly supports the conclusion that the "education records" to which those rights attach consist only of the materials, typically permanent in nature, that are part of a school's institutional records pertaining to a student and therefore have the potential for the sort of lasting impact on the student that would warrant the formal procedural protections. As suggested by the judges who dissented from denial of rehearing en banc, it "seem[s] impossible, if not implausible," that all schools throughout the country must provide the right to a hearing to challenge each of the "thousands of grades a student might receive over time" and maintain a record of access to each piece of homework and classroom work. Pet. App. D5; see 34 C.F.R. 99.22 (explaining that minimum requirements for a hearing include that it be conducted by an individual, who may or may not be an official of the school, so long as he or she does not have a direct interest in the outcome, and that parents may present

evidence and be assisted or represented by another individual, including an attorney).

Imposing on schools throughout the nation the burden and cost of the procedural requirements for parental inspection, hearings, correction of records, and documentation of access with regard to every student homework assignment and classroom exercise would have constituted a major and intrusive departure from ordinary educational practices. There is no indication that Congress intended that the enactment of FERPA, including its definition of "education records," would have that effect. To the contrary, when Congress enacted the definition of "education records," the accompanying Joint Statement by Senators Buckley and Pell, the proponents of the amendment in the Senate, explicitly stated that the amendment was "not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution." 120 Cong. Rec. 39,862 (1974). The Joint Statement emphasized:

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of *institutional records which record the grade which was actually given.*"

Ibid. (emphasis added); see *ibid.* (stating that hearing procedures must be adapted to different circumstances and noting that "[i]t is not the intent of the Amendment to burden schools with onerous hearing procedures"). See also 20 U.S.C. 1232a (stating that no provision of any federal educational program shall be construed to authorize federal exercise of "direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system").

To be sure, in connection with a hearing concerning a student's course grade (which *is* an education record when entered in the student's institutional file), the parents might bring with them any homework or classroom assignments that have been returned to the student, in an effort to support their view that the course grade was inaccurately recorded in the school's institutional records. Parents might also ask to see any of their child's coursework that the teacher may still have in the classroom. But such ancillary reference to the student's work for evidentiary purposes does not transform the student work itself into "education records" under FERPA.

3. The wording of FERPA's substantive restrictions also shows that Congress focused on the policies and practices of schools and educational agencies, not the conduct of individual teachers. For example, the statutory provision regarding inspection and review of education records states that "[n]o funds shall be made available under any applicable program to any educational agency or institution *which has a policy* of denying, or which *effectively prevents*," parents from inspecting and reviewing their child's education records. 20 U.S.C. 1232g(a)(1)(A). Similarly, the provisions restricting the release of education records without parental consent are directed at "any educational agency or institution which *has a policy or practice* of permitting the release of education records" or of "releasing, or providing access to," personally identifiable information in education records. 20 U.S.C. 1232g(b)(1) and (2) (1994 & Supp. V 1999).

The policies and practices of a school district or school typically apply on a school-wide basis to the content and handling of institutional records containing such materials as student transcripts, standardized test scores, student health records, counselors' notes, and the like that are maintained by the school. By contrast, a teacher's own handling of student homework or classroom work that the teacher has

assigned in the exercise of his or her professional judgment typically depends on the teacher's view of the educational benefits of a variety of practices, *e.g.*, whether to grade certain assignments, whether to review certain student work individually or in a group, whether to post certain work, whether to keep certain work in the classroom for the student or teacher to review during the school year, etc. FERPA's focus on policies and practices of the institution indicates that Congress did not intend to interfere with those kinds of pedagogical judgments made by individual teachers.[10]

C. The Statutory History Of FERPA And The Problems Identified In The Record Before Congress Confirm Its Focus On Institutional Records

1. Congress enacted FERPA on August 21, 1974, as Section 513(a) of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 571. As initially enacted, FERPA did not use the term "education records" or contain a definition of that term. Instead, it used three different descriptions to identify the materials that were subject to the three statutory provisions regarding parental access, the right to a hearing, and the prohibition against release without parental consent. Significantly, the most expansive description of covered records provided parents a right to inspect "any and all *official* records, files, and data directly related to their children, including all material that is *incorporated into each student's cumulative record folder*, and intended for *school*

[10] Even if a school district had a policy of requiring teachers to keep certain student work in the classroom or in the teachers' own files during the course, term, or school year, that policy would not necessarily convert the work of the *students* into institutional or official records of the *school*. Such a school district policy might be directed to the pedagogical and professional practices of the individual teacher in the classroom, not to the official recordkeeping functions of the school district itself.

use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns." *Id.* at 572 (emphasis added); see also *ibid.* (providing parents with the right to a hearing to challenge the content of "their child's *school records*" and prohibiting release, without parental consent (except in limited circumstances), of "personally identifiable records or files") (emphasis added); see also, *e.g.*, 120 Cong. Rec. at 14,580-14,581, 14,584, 14,588, 14,589, 14,594 (discussion of FERPA in the Senate, referring to "school records"); *id.* at 26,106, 26,116, 26,125 (discussion of FERPA during House debate on the Conference Report, referring to "school files," "official records," "cumulative record folder," and "school records"); S. Conf. Rep. No. 1026, 93d Cong., 2d Sess. 186 (1974) (discussing parental rights under FERPA "to inspect their children's files and * * * to a hearing to contest their child's 'school records'"); 120 Cong. Rec. at 24,586 (H.R. Conf. Rep. No. 1211, 93d Cong., 2d Sess. (1974) (same)).

Thus, the subject of FERPA as originally enacted was institutional records, not a student's homework or classroom assignments. Questions nevertheless soon arose about FERPA's scope and operation. A few months later, on FERPA's effective date (November 19, 1974), various documents relating to FERPA were inserted into the Congressional Record by Senator Buckley, one of the principal sponsors of the law. See 120 Cong. Rec. at 36,528-36,535. One of those documents was a series of questions and answers that addressed concerns regarding FERPA, including

an inquiry about the breadth of the statutory term "any and all official records, files, and data," which described the materials to which parents were guaranteed access. This document stated that FERPA applied to "official records or files or data" that were "'intended for school use or to be available to parties outside the school or school system,'" *id.* at 36,533 (quoting statute), and explained that "[r]ecords 'intended for school use' should generally include those established by an office or a division of the school for the use of that office or division," *ibid.* The document further emphasized that "[t]he definition of the words 'official' and 'intended for school use' are of major importance," that regulations were being developed, that consideration may properly be given to the "use to which the files are put," and that the law should be implemented "with an attitude of reasonableness." *Ibid.*

The question-and-answer document submitted by Senator Buckley also addressed the question whether FERPA required a school to provide a hearing to a student who wished to challenge a grade received on an essay. 120 Cong. Rec. at 36,533. The response dismissed that concern as "another red herring," explaining that "[t]he question of a grade is a matter to be taken up with the teacher involved, and perhaps the department chairman," and that hearings are for instances of "erroneous information (as a grade incorrectly recorded), anecdotal comments or evaluations by teachers, or personal information on the student or parents which probably has no business being in such a file." *Ibid.*

Against that backdrop, on December 19, 1974, Congress enacted an amendment, retroactive to the original effective date,[11] to resolve ambiguities that had been identified in FERPA, including "[c]larifying the definition of the

[11] See Act of Dec. 31, 1974, Pub. L. No. 93-568, § 2(a) and (b), 88 Stat. 1858-1862; 20 U.S.C. 1232g note.

education records involved." 120 Cong. Rec. at 41,392; *id.* at 40,459. As part of that amendment, Congress added the definition of "education records," and inserted that term in place of the list of materials to which parents were accorded a right of access, and in place of the description of the records that were to be subject to challenge, the right to a hearing, and not to be released without parental consent. 88 Stat. 1859-1860. The Conference Report stated that FERPA, as originally enacted, "contain[ed] a laundry list of items which are to be available to parents and students" and made "inconsistent references to 'personally identifiable information, school records,' etc.," and explained that the new amendment "uses the generic designation, 'education records' and defines that term." S. Conf. Rep. No. 1409, 93d Cong., 2d Sess. 10 (1974); 120 Cong. Rec. at 40,549 (same).

The Joint Statement presented by Senators Buckley and Pell, the proponents of the amendment, similarly explained that use of the generic term "'education records,' eliminat[ed] the long list of illustrative examples" contained in FERPA as originally enacted. 120 Cong. Rec. at 39,862. Consistent with the manifest intent of Congress simply to clarify the meaning of "education records" covered by the Act, the Joint Statement and other statements by Members of Congress during the debate on the amendment refer to "institutional records," "school records," and "documents * * * used by the institution in making institutional decisions concerning a student." See, *e.g.*, *id.* at 39,858-39,859, 39,862-39,863, 41,394. There is, by contrast, no indication in the legislative history that Congress intended to depart from the focus of FERPA as originally enacted on "official" records, the student's "cumulative file," and "school records." See also 40 Fed. Reg. at 1208 (Secretary's notice of proposed rulemaking to promulgate regulations to implement FERPA provisions that establish certain rights regarding students' "official records").

2. The legislative record before Congress at the time FERPA was enacted also supports the conclusion that Congress intended FERPA to apply to institutional records of students, not to student homework or classroom assignments. That record demonstrates that Congress was concerned with the rapid expansion of information included in students' institutional records and the potential for misuse of such information by schools, employers, and government agencies, to which such information was regularly released. Senator Buckley explained that "[w]hen parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material[s] can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student." 120 Cong. Rec. at 14,580.

Representative Kemp had raised concerns about protecting the privacy rights of parents and students in school records, citing an article that traced the "growth of student records into an all-inclusive dossier." The article discussed instances in which parents were unable to gain access to schools files and reported occasions on which schools had disclosed files that contained misleading or inappropriate information about a student or his family. 120 Cong. Rec. at 9369-9370; see also *id.* at 9633-9635, 9645-9646) (reproducing Diane Divoky, *Cumulative Records: Assault on Privacy*, Learning (Sept. 1973)); *id.* at 36,528-36,531 (same)). Representative Kemp quoted the article's description of a typical student record compiled in the New York City school system—a description limited to the official school file—and spoke of the "potential misuse by disclosure of extensive

information about pupils, maintained in the various public and private school systems." *Id.* at 9369.[12]

The article discussed by Representative Kemp also referred to a survey by the Russell Sage Foundation, which had found that "the [school] systems maintained[,] as part of their permanent files" a wide range of information on students; that such information was accessible to federal law enforcement offices in more than half the school systems; but that parents had access to the whole file in less than ten percent of the systems. 120 Cong. Rec. at 9634. The article then summarized proposed record-keeping guidelines (developed by the Russell Sage Foundation as a result of the survey) that recommended: no collection of data from students without parental consent; maintenance of only basic data on a permanent record card, with other information periodically reviewed and destroyed where appropriate; verification of the accuracy of the data in pupil records; parental access to their child's whole record, "including the right to challenge the accuracy of the information found therein"; and no access to pupil data, without parental consent, by persons other than school personnel who deal with the child. *Ibid.*[13]

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[12] That New York City school record contained a wide range of materials, including grades, standardized test scores, and health records, as well as an "anecdotal file" by teachers on student behavior, and reports by counselors, psychologists, and social workers. 120 Cong. Rec. at 9370.

[13] The Russell Sage Foundation's publication, *Guidelines for the Collection, Maintenance & Dissemination of Pupil Records* (1970) (*Guidelines*), was discussed elsewhere in the legislative record. See, *e.g.*, 120 Cong. Rec. at 13,952; 14,582. The Guidelines' discussion of pupil records focuses on "school records." *Guidelines* 13-14, 26-27, 32, 36-37. The only reference to student work is a reference to "[w]ork *samples*" as one type of information that may be contained in pupil records. *Id.* at 48 (emphasis added); see also *id.* at 20-21, 48. In a speech in 1975, Senator Buckley explained that the recommendations in the Guidelines "in large part formed the basis" of the amendment that he proposed and that became FERPA. See 121 Cong. Rec. 13,990 (1975).

Neither Representative Kemp nor the article made any mention of homework or classroom work as a subject of concern. The article noted only that "*samples* of student work" (120 Cong. Rec. at 9634) are sometimes included by schools in their permanent files on students—where they would be "education records."[14]

When Senator Buckley thereafter introduced FERPA on the floor of the Senate (as an amendment to the Education Amendments of 1974), he spoke of the problems posed by "secret school records" and cited a similar article by the same author. 120 Cong. Rec. at 13,951; see also *id.* at 13,953 (reproducing Diane Divoky, *How Secret School Records Can Hurt Your Child*, Parade Magazine (Mar. 31, 1974)). That article expressed concerns about student records that include not just "hard data, such as IQ scores, medical records, and grades," but also "soft data," such as teacher anecdotes, notes on parent interviews, and disciplinary reports that are "routinely filed away in school offices or stored in computer data banks." 120 Cong. Rec. at 13,953; see also *id.* at 13,954, 14,580, 17,718 (citing a handbook prepared by the National Committee for Citizens in Education, J. William Rioux & Stuart A. Sandow, *Children, Parents and School Records* (May 1974), that addressed official, institutional files).[15]

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[14] Representative Kemp also entered into the Congressional Record a research paper that discussed strategies for preventing abuses of information contained in "school records." See 120 Cong. Rec. at 9928-9930, 9985-9987, 10,142-10,144 (reproducing Sarah C. Carey, *Students, Parents and the School Record Prison: A Legal Strategy for Preventing Abuse, reprinted in* 3 J.L. & Educ. 365 (July 1974)). The article discussed students' "permanent file[s]" and criticized the "voluminous and subjective or unverifiable material that goes into a child's file in many school systems." *Id.* at 9929.

[15] The congressional debates on FERPA also addressed concerns about students being subjected to psychological and other testing without parental consent (*e.g.*, 120 Cong. Rec. at 13,951), and the gathering of data from students, including by federal agencies, through questionnaires about very personal habits of the students and their families (*e.g.*, *ibid.*). The provision introduced to address the first concern was defeated on the Senate floor, *id.* at 14,595, but the provision addressing the second concern was enacted as part of FERPA, see 20 U.S.C. 1232g(c).

Neither Senator Buckley nor the article expressed any concern about student homework or classroom work.[16]

Thus, the legislative record demonstrates that Congress was concerned that institutional records maintained by schools on students contained too much misleading and inappropriate information that parents could not review, and that such information was being disclosed by schools to other people making decisions about the student, such as employers and government agencies. Congress enacted FERPA to respond to those concerns and, accordingly, addressed the statute's protections to institutional records.[17]

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[16] Senator Buckley also had printed in the Congressional Record several sample "parental consent" forms to demonstrate that parental consent requirements would not cause undue problems. See 120 Cong. Rec. at 13,952, 13,954; see also *id.* at 14,581-14,582. The sample forms were from the Russell Sage Foundation Guidelines, see note 13, *supra*, and referred to "permanent pupil records" that included materials such as the official administrative record, standardized test scores, teacher and counselor observations, and family background data. 120 Cong. Rec. at 13,954.

[17] The Department of Education, in a letter issued by its Family Policy Compliance Office (FPCO) in 1998, expressed the view that FERPA does not "prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class." Pet. App. F4. On the other hand, a recent review of FPCO's files reveals that on a number of occasions the Department has issued technical assistance letters and letters of findings that conclude that the term "education records" includes student work once it is collected by a teacher. Although that analysis does not contradict the conclusion that the practice at issue in this case does not violate FERPA, such a practice would have been perceived by FPCO to violate FERPA if the teacher had collected the student work and then handed the work back for students to correct

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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the work of other students. See Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Mr. Julio Almanza (Jan. 28, 2000). To the extent these and related letters may be regarded as inconsistent with the position set forth in this brief (*e.g.*, treating teacher grade books as education records that are not covered by the "sole possession" exception, 20 U.S.C. 1232g(a)(4)(B)(i), see Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Mr. Andrew Marko (June 25, 1998)), this brief represents the position of the United States on the issue.

The brief filed at the petition stage in response to the Court's invitation stated (at 13-14, 17-19) that, in response to the court of appeals' decision in this case, the Department of Education had determined that it would issue regulations or formal guidance setting forth a more detailed analysis of the meaning of "education records" under FERPA and the application of FERPA to a variety of practices, including the grading practice at issue in this case. In light of the Court's decision to review this case, however, the Department determined that since the Court would be addressing the applicability of FERPA to the education practice at issue in this case and perhaps the meaning of "education records" more broadly, it would not at this time issue such regulations or guidance. Accordingly, this brief represents the position of the United States in this case.

APPENDIX

Section 1232g of Title 20 of the United States Code provides:

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under

this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is,

upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of post-secondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be

personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; record-keeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

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[1] So in original. The period probably should be a semicolon.

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution

which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(E) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of Title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of

students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this chapter [20 U.S.C.A. § 1221 et seq.] or chapter 28 of this title [20 U.S.C.A. § 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).

Aug 23, 2001

(6)

Supreme Court, U.S.
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No. 00-1073

In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS, et al.,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN;

Respondent.

REC'D TEAM 11
AUG 31 2001
UNSCANNED

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF OKLAHOMA EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), which requires educational institutions to preserve the confidentiality of "education records," prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class.

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BRIEF FOR THE OKLAHOMA EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Oklahoma Education Association respectfully submits this brief *amicus curiae* in support of the Petitioners, with the consent of both parties, pursuant to Sup. Ct. R. 37.3.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Oklahoma Education Association ("OEA") is a non-profit association that represents approximately 40,000 public school employees in the state of Oklahoma. Founded in 1889 prior to statehood, the OEA represents all categories of education employees in the public school systems of the state of Oklahoma and is an affiliate of the 2.6 million member National Education Association. The OEA's primary focus is to organize around quality teaching and learning while continuing to advocate for and secure the rights and benefits of all public education employees in the state of Oklahoma.

Because the membership of the OEA, many of which are faculty members of the Petitioner School District, is directly impacted by the decision of the Tenth Circuit Court of Appeals interpreting certain portions of the Family Education Rights and Privacy Act, 20 U.S.C.

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[1] No counsel for any party authored this brief *amicus curiae*, either in whole or in part, and no persons other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Letters of consent of the parties are filed herewith.

§ 1232g ("FERPA"), the OEA has a unique interest in the detrimental effect of this decision upon quality teaching and learning – the primary focus of the OEA in its mission to promote the cause of quality public education in Oklahoma. Accordingly, the OEA respectfully submits the perspective of its membership on the significance of this ruling and its impact on traditional pedagogical teaching and learning tools commonly utilized by educators in the state of Oklahoma and throughout the nation.

SUMMARY OF ARGUMENT

Evaluation of students through grading, testing and ability grouping remains an important aspect of the American educational system. Educators throughout the nation employ a plethora of techniques and procedures in their attempt to determine the most objective evaluations of the academic and cognitive ability of the students under their charge. As a result, some system of grading or measuring the academic progress of students has been a constant in the ever evolving public education system that embodies the ideal of ensuring a free and appropriate education for our nation's children.

In the pedagogical context, a grade is an abstract bit of information reflecting the results of a homework assignment, quiz, or similar assessment. In assessing and monitoring the progress of students under their charge, a classroom teacher is constantly re-teaching those individuals who, in the assessment of the classroom teacher, have not mastered the stated objective. In this circumstance, grades assigned by a classroom teacher on routine

homework assignments or other daily classroom work are used as representations of student academic performance which reflect the particular assessment from the classroom teacher in monitoring a student's progress in mastering the stated objective. In evaluating a long-standing grading practice, the United States Court of Appeals for the Tenth Circuit has decided an important question of federal law that suddenly has a significant impact on all educators and dramatically alters long-standing customs and practices which comprise the day-to-day operation of our public school systems.

The Tenth Circuit issued a decision involving the construction and interpretation of FERPA that struck down a common grading practice utilized by public school teachers in Oklahoma and which now creates the potential for individual liability for perceived violations of FERPA in the future. The decision of the court of appeals has not only generated much confusion and uncertainty among public educators throughout the state of Oklahoma as it pertains to the legality of a traditional pedagogical practice, but also raises more questions and confusion regarding the impact of FERPA and this ruling on other traditional teaching and learning tools commonly utilized by public educators and whether such tools are also prohibited under the interpretation of this federal statute by the Tenth Circuit Court of Appeals.

Amicus curiae recognizes that the assignment of letter grades – when used as final representations of student academic performance and achievement – are important not only to the students themselves, but to parents, higher education institutions, prospective employers, and others. Although the privacy interests of both parents –

and students that are set forth in the articulated purpose of FERPA are of paramount importance, the OEA urges reversal of the Tenth Circuit decision which, if left undisturbed, will unnecessarily impact traditional pedagogical practices and potentially operate as an impediment to the educational process of local school districts in Oklahoma and throughout the nation.

ARGUMENT

The issue before the Tenth Circuit Court of Appeals was whether the common practice of allowing a student to grade another student's homework, class work, or quizzes constitutes an impermissible disclosure of an "education record" under the Family Education Rights and Privacy Act. The facts were largely undisputed and the primary legal issue before the court of appeals was whether a traditional teaching practice was prohibited under FERPA – allowing classroom teachers to have students exchange papers for the purpose of correcting erroneous responses and providing an amplified understanding of why a particular response was either correct or incorrect.

This common practice is utilized by many classroom teachers in Oklahoma and is viewed by many educators as a traditional teaching and learning tool because it allows students to receive immediate feedback on, and evaluation of, their daily work. Trading homework papers or daily work is the classroom equivalent of "flash cards." Repetition of a basic skill, coupled with immediate feedback, is a primary component in mastering a

particular academic objective. From a practical perspective, this common practice also allows teachers to be more efficient and productive in their day-to-day responsibilities of assessing the academic progress of students under their charge through their daily work.

In rejecting this common grading practice, the court of appeals concluded that, "[B]ased purely on the language of the statute itself, . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA." *Falvo v. Owasso Independent School Dist. No. I-011*, 229 F.3d 956, 969-970 (10th Cir. 2000) (Footnote omitted). Regardless of whether a grade is ultimately recorded in a grade book or utilized in calculating a final grade, the court concluded that this common grading practice was contrary to the intent of Congress when enacting FERPA and stated that "the method of reporting the grades is irrelevant to our analysis, because a disclosure occurs at the earlier stage when one student grades the work of another." *Falvo*, at 969 n.10. Four judges dissented from the court's order denying rehearing *en banc* and criticized the majority holding as an unwarranted expansion of the clear language of the statute which was unsupported by any legislative history. *Falvo*, at 960.

The four dissenting judges criticized the majority opinion defining "education records" and argued that the court's decision creates an implausible obligation of an educational institution under FERPA "to maintain an access record indicating those who have obtained or requested access to" the possible thousands of grades a particular student may accumulate over the course of her

common education. *Falvo,* at 961. The dissenting judges suggested that a careful reading of FERPA and its legislative history required a much narrower definition of "education record" than ascribed by the majority and further noted the "obvious difference, however, between grades entered in a grade book (a collective record of the teacher) and the individual grades (on student papers) that are not recorded in a grade book." *Falvo,* at 960-961.

In examining the Joint Statement in Explanation of the Buckley/Pell Amendment, 120 Cong. Rec. 39,862 (1974), the dissenting judges noted that the Joint Statement "drew a critical distinction between an institutional record in which a grade was recorded (the accuracy of which can be challenged) and the graded material itself (the accuracy of which cannot be challenged)," and further noted that the Joint Statement concluded "that 'education records' referred only to the former." *Falvo,* at 961.

As set forth in the dissenting opinion, the court of appeals' expanded definition of "education records" creates an illogical interpretation of FERPA as a whole and is not supported by either the plain language of the statute or its legislative history. *Amicus* OEA suggests that the court of appeals' interpretation of the phrase "education records" is fundamentally flawed and that the court of appeals erred in concluding that FERPA prohibits peer grading of homework papers, class work, or quizzes in our nation's classrooms.

I. THE COURT OF APPEALS ERRED IN REJECTING THE LONG-STANDING INTERPRETATION OF FERPA BY THE FAMILY POLICY COMPLIANCE OFFICE OF THE DEPARTMENT OF EDUCATION

The traditional practice of allowing students to exchange papers for grading purposes had been recognized by the Family Policy Compliance Office ("FPCO") of the United States Department of Education as an acceptable practice under FERPA. FPCO is the federal agency charged with investigating, processing, and reviewing complaints and/or violations under FERPA. The FPCO is also charged with providing technical assistance to educational agencies or institutions in order to ensure compliance with FERPA and its legislative mandates. In holding that peer grading of homework papers does not violate FERPA, the district court relied in part on an advisory opinion letter issued by Leroy S. Rooker, Director of the Family Policy Compliance Office, which set forth an advisory opinion by FPCO that this traditional teaching practice did not violate FERPA. (Petition for Certiorari, App. B2-B3; and F3-F6). The FPCO advisory opinion explains that FERPA does not prohibit such grading practices because homework assignments and tests, as well as the grades assigned to them by other students in such circumstances, "would fall outside the FERPA definition of education records as they are not, strictly speaking, 'maintained' by an educational agency or institution at that point." (Petition for Certiorari, App. F4-F5).

The court of appeals specifically concluded that the "Rooker letter" and subsequent declaration (Petition for Certiorari, App. F1-F3) had been afforded an undue

degree of deference by the district court and summarily concluded that the advisory opinion issued by FPCO was not entitled to the traditional doctrine of judicial deference afforded agency interpretations set forth in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Tenth Circuit concluded that because "the meaning of the terms 'education records' and 'maintained' are clear from the statute itself, and a court can only defer to an agency's interpretation if a statute is deemed ambiguous," the FPCO advisory opinion lacked "the power to persuade" and therefore was not "entitled to respect" under the rationale set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Falvo*, 229 F.3d at 969. The court of appeals further held that, assuming there existed some ambiguity in the statutory scheme, the judicial deference normally afforded an agency interpretation in those circumstances would not extend to the "Rooker letter" and subsequent declaration because the interpretations were set forth in an opinion letter issued by the administrative agency. *Falvo*, at 969 (*citing Christensen v. Harris County*, 529 U.S. 576 (2000)).

Although the court of appeals recognized that an agency opinion interpreting statutory intent is generally "entitled to respect" under the rationale set forth in *Skidmore*, the court of appeals then summarily rejected the FPCO advisory opinion by concluding that the "Rooker letter" did not contain a sufficient explanation of the agency's reasoning, failed to consider the "breadth of FERPA's language," and that the advisory opinion was based on a hypothetical consideration of the issue as

opposed to a particular factual setting in the school district. *Falvo*, at 969. Apparently relying solely on a qualifying prefatory statement set forth in the advisory opinion, the court of appeals afforded no deference to the opinion's "general discussion" of FERPA as it applied to the *identical* issue and concluded that "in issuing the opinion, the FPCO may not have thoroughly considered the issue before this court." *Falvo*, at 969.

The outright rejection by the court of appeals of the FPCO advisory opinion ignores the value that agency opinions often contribute to the judiciary. In *Skidmore*, this court acknowledged the value of such agency opinions and suggested that rulings, interpretations and opinions of an administrative agency, "while not controlling upon the courts by reason of their authority, *do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . .*" *Skidmore*, 323 U.S. 139, 140. (Emphasis added). In this case, the value of the agency interpretation has been ignored by the court of appeals, thereby casting doubt upon the effect of the FPCO advisory opinion and subsequent declaration on all other states not specifically included within the jurisdiction of the Tenth Circuit. For example, although the individual defendants in the instant case were afforded the defense of qualified immunity from personal liability because of reliance upon the FPCO advisory opinion, putative plaintiffs in other jurisdictions will surely assert that the law is "clearly established" when alleging future FERPA violations in jurisdictions not bound by the Tenth Circuit decision in this case – even where classroom teachers and other school officials

rely, in good faith, upon an interpretation of the federal agency created to ensure FERPA compliance.[2]

Considering the two primary purposes articulated as a basis for enacting FERPA – to ensure access to education records by students and parents and to protect the cumulative academic files of eligible students – the analysis of the court of appeals in defining what constitutes an education record under FERPA ignores the statutory context, ignores the legislative history, and clearly disregards the practical impact upon the education system in general. In short, the court of appeals attempts to transmogrify a routine homework assignment into an education record that is maintained in a student's permanent institutional academic file. For that reason alone, the FPCO advisory opinion warranted at least some minimal deference by the court of appeals, instead of complete rejection by the court of appeals and substitution of its own expanded construction of the statute.

The FPCO advisory opinion recognized the clear language of FERPA and attempted to delineate what constitutes an "education record" that is "maintained" by an educational institution by giving practical effect to all portions of the federal statute. The policies and positions formulated by the agency charged with preserving the

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[2] Although the court of appeals rejected the Rooker letter as unpersuasive, the court relied upon the FPCO's long-standing interpretation of this issue to suggest "that the right which we elucidate today was not clearly established" and then held that, as a result, the individual defendants were entitled to qualified immunity from personal liability in the lower court proceeding. Falvo, 229 F.3d at 974.

education privacy rights for parents and students are far more likely to reflect a reasoned and informed understanding of the practical aspects of the specific provisions of FERPA that impact our nation's classrooms than the often narrow and sterile view presented to a typical judge. *See, generally, Skidmore,* 323 U.S. at 139. Although the positions set forth by the FPCO in its advisory opinion may not merit the level of deference set forth in *Chevron,* OEA suggests that the advisory opinion should be afforded the "respect" warranted by *Skidmore* before the court of appeals embarks upon its own contradictory construction of the term "education records."

Although the court of appeals concluded that the "Rooker letter" lacked sufficient reasoning and failed to consider the breadth of FERPA's language, the FPCO opinion interprets the key phrase "education records" in a simple and straight-forward manner, based upon a thoughtful, common sense, and flexible approach. In contrast to the FPCO's interpretive construction of key FERPA provisions, the Tenth Circuit's expansive definition of the term "education records" was prefaced with a disclaimer: "[S]hould our interpretation cause public discomfort or impose undesired burdens, it is the source of the enactment, Congress, that those who are discomforted or burdened must turn for relief." *Falvo,* 229 F.3d at 968. Rather than "go wherever the language and intent of the statute take us" as suggested by the court of appeals (*id.* at 968), affording the FPCO advisory opinion at least "minimal respect" would result in interpretation of this particular act of Congress in an objective manner and with the intent of producing the desired results for the

public good, particularly in view of the body of experience and informed judgment of the agency charged with preserving the education privacy rights of parents and students. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). There exists no justification for ignoring the FPCO advisory opinion and its interpretation of FERPA, particularly in view of the alternative interpretation advanced by the court of appeals.

II. THE COURT OF APPEALS' NEW DEFINITION OF "EDUCATION RECORDS" IGNORES AN ORDINARY MEANING ANALYSIS AND DRAMATICALLY IMPACTS LONG-STANDING PEDAGOGICAL PRACTICES

FERPA defines "education records" as "those records, files, documents and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The specific phrase "and other materials" is instructive in interpreting the intent of Congress and the meaning of "education records" under FERPA. The common dictionary definition of "materials" suggest something of a physical nature. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 717 (10th ed. 1998). The Latin root of the word material is identical to that of the word "matter" and is defined as a "physical substance."

See id. at 717. Applying an "ordinary meaning" analysis suggests that an "education record" is a tangible item consisting of records, files, documents, and other materials. The specific list of other materials that are included in the definition of "education records" refers to the physical repositories of information, not to the information itself. Absent this distinction between the terms "records" and "information," the definition set forth in the first descriptive subsection of FERPA, which states that "education records" are materials that "contain information" directly related to a student, is rendered superfluous and there would exist no distinction between the materials or the information itself in determining what is an "education record" under FERPA.

The second subsection of the "education records" definition set forth in FERPA requires that the records, files, documents, or other materials in question be "maintained" by the educational institution or an agent acting on behalf of the educational institution. In order to satisfy the disclosure prohibition under FERPA, the district court below utilized an ordinary meaning analysis to define the term "maintain." (Petition for Certiorari, App. B3-B4). The common dictionary definition of "maintain" is "to keep in an existing state." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 702 (10th ed. 1998). The Latin root of the word maintain means "to hold in the hand." *See id.* at 702. Pursuant to an ordinary dictionary definition, to "maintain" an education record would necessarily mean that those records, files, documents, and other materials are held and preserved in an existing state by an educational institution.

Construing these statutory terms in accordance with their ordinary meaning suggests that only those records, files, documents and other materials that are held and preserved in an existing state by an educational institution and which contain information directly related to a student are prohibited from disclosure under FERPA as "education records." In stark contrast to this basic precept, the court of appeals has determined that ordinary homework and routine quiz grades, as distinguished from the actual homework papers or quiz sheets, are education records maintained by an educational institution simply because those grades *may be* eventually recorded in a teacher's grade book.

Notwithstanding the specific language deliberately chosen by Congress when enacting FERPA, the court of appeals has extended the definition of "education record" to include the scores students may give one another on daily papers pursuant to a traditional grading practice previously deemed in compliance with FERPA by the federal agency charged with investigating, processing, and reviewing complaints and/or violations under FERPA. In expanding the ordinary meaning of the phrase "education record," the court of appeals stated that "[T]here was no dispute that the grades which students place on each other's papers and then report to the teacher 'contain information directly related to a student' and thus satisfy the first element of the statutory definition for 'educational record'." *Falvo,* 229 F.3d at 970. The overly broad definition of "education records" established by the court of appeals has resulted in confusion and apprehension among educators, even to the extent of

disrupting traditional and routine pedagogical methods of learning.

For example, a common teaching and learning tool utilized by many middle school and high school teachers is the concept of peer evaluation of group work as part of an overall assessment of a particular academic activity. Such peer evaluations are common in science disciplines where students are assigned in groups for the purpose of completing a particular science project and each member of the group is required to assess or critique the participation of other members of the group with regard to achievement of the stated objective required by the particular project. Another common teaching and learning tool utilized by many pre-secondary classroom teachers is the concept of team learning wherein students are encouraged to "share with their neighbor" what they have mastered with regard to a particular learning objective and to assist fellow students in achieving the same mastery of the stated objective. These cooperative learning models are traditional pedagogical tools commonly utilized by educators in Oklahoma and are effective learning tools for particular academic disciplines. In this context, such group assessments of individual student participation would clearly involve disclosure of "education records" under the broad and expansive definition set forth by the court of appeals.

In addition to the obvious academic disciplines such as mathematics that require daily grading of written assignments or other written classroom work, other academic disciplines such as liberal arts are also impacted by the court of appeals' overly broad definition of "education records." In foreign language classes, discourse in

the particular foreign language among other members of the class is a required element of the curriculum and it would belie common sense to suggest that an "education record" – as now defined by the court of appeals – would not be disclosed by the simple observation of fellow students in their mastery (or lack thereof) of the particular foreign language. In the context of an art class, does the display of an individual student's art work on school premises impermissibly disclose an "education record" maintained by an educational agency or institution under FERPA? Similarly, one could also argue that a band teacher is now required – under the court of appeals interpretation of FERPA – to individually and in private audition each student under their charge to determine whether or not a particular student has made sufficient progress in learning a particular musical instrument and to assign "rankings" for participation in school band activities or concerts. "First chair" solo band performances during a school concert may now constitute an impermissible disclosure of "education records" under FERPA.

In more traditional academic settings, requiring a verbal presentation of a report on a particular literary work or a presentation illustrating the competing interests associated with a social or political issue is a common curriculum component and such presentations are typically used as a basis to formulate a nine-week or semester grade. Likewise, the *Socratic* methodology of teaching is utilized in many advanced secondary school curricula. Where such presentations or class participation are used as a basis to formulate a final academic grade, one could logically conclude that "education records" may be

impermissibly disclosed by such traditional practices under the court of appeals ruling.

Any routine pedagogical teaching and learning tool or practice – from routine collection of homework papers or quizzes to having students solve a physics equation on a chalkboard in front of the entire class – could clearly constitute a prohibitive practice under the court of appeals holding and subject educators and other school officials to individual liability.[3]

Although the above examples involve common teaching and learning tools utilized by many educators in Oklahoma and throughout the nation, there exists a parallel concern among educators regarding exactly what constitutes a prohibited disclosure of "education records" under the recent decision by the court of appeals. Many educators and school officials are questioning practices that reveal *any* information directly related to a student in a particular school system. For example, some school districts are now hesitant to publish honor rolls, academic achievement awards, and eligibility lists for participation in extracurricular activities for fear that such information may be construed as "education records" under the court of appeals ruling – despite a specific exception under

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[3] The only statutory remedy provided by Congress for violations of FERPA is the termination of federal funding upon a finding that an educational institution maintains a policy or practice of allowing disclosure of education records to unauthorized individuals or entities without parental consent. See 20 U.S.C. § 1232g(b)(1). The court of appeals concluded that Congress did not foreclose a remedy under 42 U.S.C. § 1983 because of the limited remedial scheme set forth in the statute itself. See Falvo, 229 F.3d at 966-967.

FERPA allowing publication of certain "directory information" under certain circumstances. *See* 20 U.S.C. §§ 1232g(a)(5)(A) and (B).

The "new" definition of education records by the court of appeals represents a clear departure from the long-standing interpretation of the FPCO as it pertains to the common pedagogical practice of peer grading. The court of appeals ruling also impacts other common teaching and learning tools utilized by many educators and casts serious doubt upon other practices that have become an integral component of the education culture. Instead of governing the permanent academic record of a particular student – normally consisting of semester or final grades, results of standardized ability or achievement tests, and other institutional information directly related to a student – an "education record" is now construed to include any *grade* or other information reflecting assessment from the classroom teacher which may or may not be recorded and contained in a record, file, document or other material maintained by a school district. *Amicus* OEA suggests that the former, rather than the latter, reflects the legislative history of FERPA as well as an ordinary understanding of the intent of Congress in enacting this federal statute.

CONCLUSION

For the reasons set forth herein, *amicus curiae* Oklahoma Education Association respectfully suggests that the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT
NO. 1-011, ET AL.,
Petitioners,

v.

KRISTJA J. FALVO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE STUDENT PRESS LAW CENTER URGING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Student Press Law Center is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free press rights of student journalists. As the only national organization in the country devoted exclusively to this purpose, the SPLC has collected information on student media cases nationwide and has submitted amicus curiae briefs in numerous cases before state and federal courts.

Amici's interests in this case lie in its potentially sweeping implications for newsgathering and reporting. Federal laws designed to limit disclosure of information affect what the public can learn about its government and other institutions, particularly when they are enforced in such a way that will make state governments err on the side of nondisclosure in the face of civil rights suits. And more specifically, the Family Educational Rights and Privacy Act itself is being interpreted in an inconsistent and somewhat haphazard manner that already is jeopardizing traditional reporting in the

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

scholastic press.

STATEMENT OF FACTS

Amici defer to the parties for an explanation of the factual history and procedural posture of the case, other than to note that a critical jurisdictional issue — whether a remedy under 42 U.S.C. § 1983 is appropriate for what is essentially a records disclosure law — was decided by the court below without a full briefing by the parties. *Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1210-11 (10th Cir. 2000).

SUMMARY OF THE ARGUMENT

This Court is being asked to more clearly define what constitute "education records" under the Family Educational Rights and Privacy Act. *Amici* take no position as to whether the school test papers at issue in the present case qualify as such records under FERPA. Rather, *amici* seek to have this Court clarify two other aspects of FERPA that implicate the present case.

First, *amici* ask this Court to recognize that, as a threshold jurisdictional matter, federal civil rights laws cannot be used to vindicate statutory privacy interests like those identified by FERPA, as opposed to actual constitutionally mandated privacy rights. Such application will have a devastating impact on public access to government-held information, as every congressional mention of privacy interests will lead to access denials out of fear of nearly unlimited civil rights liability.

This court's § 1983 case law makes clear that information access laws like FERPA should not be enforceable through

civil rights actions, because any "rights" created are not individually enforceable rights, but "systemwide" rights meant to allow Congress to enforce its interests through the spending power.

In addition, *amici* ask that as this Court attempts to more clearly define "education records" under FERPA, it should take the opportunity to make certain that access to information needed by student and professional journalists is not unnecessarily denied.

ARGUMENT

I. Privacy interests created by federal information disclosure rules are not a valid basis for a § 1983 claim, and the consequences of turning every disclosure regulation into a civil rights law would have drastic implications for the public's right to know how its government operates.

In this case, this Court is being asked to more clearly define what constitute "education records" under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2001) (hereinafter "FERPA"). However, as a threshold matter, it must first decide whether release of such records is remediable under the federal civil rights statute, 42 U.S.C. § 1983.

The Tenth Circuit found that although the issue had not been addressed by the parties, § 1983 was an appropriate remedy for an alleged violation. *Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1211 (10th Cir. 2000).

But such a finding cannot be accepted so readily, and requires careful consideration of the impact of such a decision.

Application of the civil rights remedy to statutes like FERPA goes one significant step beyond the typical § 1983 action by asking courts to enforce not a constitutionally mandated privacy right, but a privacy interest that is "created" simply by congressional action to limit disclosure of a certain class of government records.

Amici do not ask this Court to declare FERPA unconstitutional; we ask instead that the Court recognize that FERPA and other information disclosure regulations do not create a privacy right that can be vindicated by a § 1983 civil rights suit. And as will be discussed *infra* at section II, it is not the plain language of FERPA that makes the privacy interests so threatening to public access, but the broad, inconsistent and quite frankly dubious nature in which FERPA requirements have been interpreted by courts and school administrators that compels a closer look by this court.

A. Allowing § 1983 claims to vindicate information disclosure interests will dramatically affect public access to information, and will wipe out the careful balancing between access rights and privacy interests that is regularly conducted by legislatures.

FERPA is an information disclosure rule that specifies how schools must handle student records if they wish to receive federal funds. It does not specify any individual cause of action as a remedy, but instead allows federal officials to withhold funds from schools that do not comply. *See* 20 U.S.C. § 1232g, subsections (a)(1)(A); (a)(2); (b)(1); (b)(2); and (e) (2001). Thus, litigants often seek access to federal courts under the federal civil rights law, 42 U.S.C. § 1983,

when they feel their privacy interests in school records have been violated.

But allowing § 1983 claims for perceived violations of statutes like FERPA, as well as all future regulations enacted by Congress that address privacy interests but create no private cause of action, will have staggering implications. States will have no choice but to completely bar access to entire categories of information once Congress acts in a particular area, for fear of massive civil rights liability for alleged violations. The debates over balancing the public interests in disclosure of information with the private interest in secrecy of personal information will simply end under the shadow of a disclosure "death penalty" in the name of civil rights.

This balancing between access and privacy interests is appropriately left to the legislatures. State legislatures continually wrestle with privacy issues and how those issues come into conflict with governmental disclosure of information and the people's right to know how their government acts.

There are a multitude of laws enacted by Congress to govern the dissemination policy of government records. These laws were drafted by Congress in light of the strong countervailing interests in access and privacy. Congress balanced these interests in the manner it felt was most appropriate. Allowing § 1983 suits to be brought on these statutes disrupts the tenuous balance struck by Congress between access and privacy.

These laws are government information dissemination laws, not civil rights laws, and should not be made such through a misapplication of § 1983.

B. An ambiguous privacy *interest* gleaned from a federal statute, as opposed to a recognized constitutionally mandated privacy right, cannot justify a § 1983 claim when it does not explicitly create a privacy *right*.

Not all mentions of privacy interests in federal regulations give rise to privacy "rights" that can be vindicated by § 1983 actions. Examining the history of § 1983 and what the civil rights law is meant to cover will show that the privacy interests recognized by FERPA and other information release statutes do not warrant federal civil rights actions, because the interests they acknowledge do not rise to the level of individually enforceable privacy "rights."

1. Section 1983's history shows that, in the realm of privacy rights, only interests rising to the level of constitutionally recognized privacy rights are covered.

Section 1983 is used to vindicate rights under the constitution and other federal laws. Almost exclusively, when the right being vindicated is a privacy right concerning disclosure of information, courts have only upheld § 1983 claims over constitutionally recognized privacy rights, not privacy interests purportedly created under a federal statute. FERPA is the only exception.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2000).

Congress enacted the Civil Rights Act of 1871 to stop lynchings and other violent acts against African-Americans. The Civil Rights Act of 1871, known at the time as the Ku Klux Klan Act, was passed after the Reconstruction-era amendments because Congress realized that the Thirteenth, Fourteenth, and Fifteenth Amendments "alone would not secure equality for blacks or stop the atrocities committed against them." John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW, 644 (5th ed. 1995).

The act was "designed to civilly and criminally punish those who acted to deprive others of their civil rights." *Id.*

In 1874, Congress added the phrase "and laws" to Section 1 of the Civil Rights Act. *Id.* The Civil Rights Act of 1871 and the Civil Rights Acts of 1866 and 1870 "remained dormant for many years but were resurrected in the 1960s." Harold S. Lewis, Jr., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW, 1-2 (1997) (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968)).

42 U.S.C. § 1983, the codification of section one of the original Civil Rights Act of 1871, emerged as the civil penalty provision that "provides the cause of action and general basis for federal courts to protect individual rights." CONSTITUTIONAL LAW at 644.

It was only as recently as 1980 that this Court recognized § 1983 as a vehicle to remedy claims other than civil rights or equal protection claims. *Maine v. Thiboutot*, 448 U.S. 1, 100

S.Ct. 2502, 65 L.Ed.2d 555 (1980). The *Thiboutot* court, over a vigorous dissent from Justice Powell, held that the plain meaning of "and laws" indicated that the § 1983 remedy should include violations of federal statutory law as well as federal constitutional law. *Id.* at 4-8. The Court "indirectly limited the scope of *Thiboutot* by emphasizing that a statute must create 'enforceable rights' before a court will imply a private cause of action, and that mere 'precatory' language in a statute is insufficient to establish a federal cause of action." Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, U. KAN. L. REV. 321, 331 (2001) (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 15-27, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)).

While courts have recognized privacy interests sufficient for a remedy under § 1983, those privacy interests generally involve direct violations of the Fourth Amendment. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (discussion of immunity for officers in entry into home; Fourth Amendment violation case under § 1983); *Valdez v. McPheters*, 172 F.3d 1220 (10th Cir. 1999) (expectation of privacy in residence is protected under Fourth Amendment and thus remediable under § 1983); *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992) *cert. denied*, 113 S.Ct. 2996 (1993) (forcing officer to undergo urinalysis test absent cause was violation of Fourth Amendment and remediable under § 1983).

However, other less direct privacy violations may be remediable under § 1983. In *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Supreme Court concluded that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two kinds of interests. One is the individual interest in avoiding

disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600, 97 S.Ct. at 876-77 (footnotes omitted). In *Whalen*, the Court held that, when balanced against the state's interests, an individual's privacy right was not violated by the creation of a New York state database of patients and their prescribed drugs. The Supreme Court again addressed an individual's privacy interest in avoiding disclosure of personal matters in *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-59, 97 S.Ct. 2777, 2795-96, 53 L.Ed.2d 867 (1977).

However, neither *Whalen* nor *Nixon* defined what matters were actually so personal or intimate as to be sufficient for a constitutional privacy claim under § 1983. In fact, the court in *Whalen* cited a University of Chicago article that says, "The concept of a constitutional right of privacy still remains largely undefined." *Whalen*, 429 U.S. at 600 fn. 24. Twenty five years after that statement was made, it is still true. Moreover, in neither *Whalen* nor *Nixon* did the plaintiffs prevail on their privacy claims.

Case law subsequent to *Whalen* has honed the definition of constitutionally protected "personal" information under § 1983 to include the following: "personal and humiliating" details of a rape, *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998); a video recording of sexual activity, *James v. City of Douglas*, 941 F.2d 1539 (11th Cir. 1991); sexual history information, *Eastwood v. Department of Corrections*, 846 F.2d 627 (10th Cir. 1998); personal financial information, *DePlantier v. U.S.*, 606 F.2d 654, 669-71 (5th Cir. 1979), reh. denied, 608 F.2d 1373 (5th Cir. 1979); transsexual status, *Powell v. Schriver*, 175 F.3d 107 (2d. Cir. 1999); HIV-positive status, *Doe v. City of New York*, 15 F.3d 264 (2d. Cir.

1994); *A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir. 1994); medical history, *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998); *Pesce v. J. Sterling Morton High School*, 830 F.2d 789, 795-98 (7th Cir. 1987); and personal diary excerpts, *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995).

The Court here has the opportunity to clearly establish what was left unclear in *Whalen* and *Nixon*: what information is so "personal" that its disclosure invokes a privacy right violation sufficient for a § 1983 claim. Such a violation should only be found when the privacy invasion is so highly personal or intimate," *Falvo*, 233 F.3d at 1209, that it reaches the level of an infringement of constitutionally protected privacy rights, not simply when a Congressional funding requirement was not met by a state official.

With the exception of privacy interests under FERPA, discussed *infra* at section I.B.3., only those "disclosure of information" privacy cases representing interests of a personal, intimate and confidential nature that were much more substantial than the vague right involved in the case at bar are permitted under § 1983. Even so, all of the above "disclosure of information" privacy claims under § 1983 were based on privacy rights under the Constitution, not privacy interests purportedly recognized under a federal statute, as is the case here under FERPA.

2. Federal statutes enforceable under § 1983 must specifically create individual, not merely "systemwide," rights.

There are two exceptions to the rule that § 1983 provides a cause of action for violations of federal statutes, not just

federal constitutional rights: "(1) the statute does not create enforceable rights, privileges or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself." *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 508, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990) (*quoting Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423, 107 S.Ct. 766, 770, 93 L.Ed.2d 781 (1987)).

The § 1983 analysis was further modified in *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992).

In *Suter*, the Court considered whether private individuals had the right to enforce by a § 1983 claim a provision of the Adoption Assistance and Child Welfare Act of 1980. The Act established a federal reimbursement program for certain expenses incurred by the States in administering foster care and adoption services. To receive funding, a State was required to create a plan that ensured that "reasonable efforts" would be made to eliminate the need for removal of the child from his home before the State resorted to foster care. The plan was also supposed to make "reasonable efforts" for the child to return to his home. *Id.* at 351.

The Seventh Circuit ruled that the "reasonable efforts" clause could be enforced under § 1983, but the Supreme Court held the Act did not create an enforceable right on behalf of the plaintiffs. The Court made the center of inquiry whether "Congress, in enacting the Adoption Act, unambiguously confer[red] upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family."

The statute at issue in *Suter* was mandatory in its terms: A state was required to have a plan which, among others, "provides that in each case, reasonable efforts would be made" in order to obtain federal reimbursement. Unlike the statute in *Wilder*, neither the Adoption Act nor its regulations provided any measure in determining "reasonableness." *Suter*, 503 U.S. at 360.

The Court also noted that States could not be expected to know of any requirement "other than the requirement that the State submit a plan to be approved by the Secretary." *Id.* at 361. The regulations were not specific as to what was required of the States, except obtaining approval of a plan. *Id.* at 362.

The Supreme Court most recently considered whether an enforceable right under § 1983 was created by a federal statute in *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). In *Blessing*, the Court held that individuals could not enforce certain Social Security Act provisions through a §1983 suit because the Act created only "systemwide" policies and not individual rights.

The Court listed three requirements for whether a federal statute gives rise to a "right" under § 1983: (1) "Congress must have intended that the provision in question benefit the plaintiff," (2) "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) "the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Id.* at 340-41 (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106, 110 S.Ct. 444, 448, 107 L.Ed.2d 420 (1989); *Wilder v.*

Virginia Hospital Association, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed. 2d 455 (1990) ; *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19, 101 S.Ct. 1531, 1541, 67 L.Ed. 2d 694 (1981)).

The inquiry, the Court directed, must be toward each individual claim. "Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights." *Blessing*, 520 U.S. at 342. The Court criticized the Ninth Circuit for not engaging in a "methodical inquiry" as to whether the statute created individual, not systemwide, rights. Substantial compliance was all that was required of the state agencies under the statute at issue in *Blessing*, which could be met even with non-compliance of up to 25 percent. Even non-compliance beyond such a mark only triggered penalty provisions that increase audits and reduce the state's grant. "As such it does not give rise to individual rights." *Id.* at 344. Even the statute's requirement that each State have "sufficient staff" to fulfill specified functions did not give rise to federal rights because "the link between increased staffing and the services provided to any particular individual is far too tenuous to support the notion that Congress meant to give each and every [citizen] who is eligible [under the statute] the right to have the [State office] staffed at a sufficient level." *Id.* at 345. However, the *Blessing* Court left open the possibility that some provisions of the Act might give rise to individual rights and remanded to determine exactly what rights plaintiffs were asserting.

Suter and *Blessing*, therefore, clarify that §1983 does not provide an individual enforcement mechanism unless Congress clearly imposed mandatory obligations on a State

and those obligations are "unambiguous." Furthermore, participating institutions must be able to exercise their options "knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540, 67 L.Ed.2d 694 (1981); *see also Suter*, 503 U.S. at 362. Finally, the statute must do more than mandate systemwide performance of a program; it must create individualized rights. *Blessing*, 520 U.S. at 344-46.

3. FERPA interests are not remediable under §1983 because FERPA creates "systemwide" rights, not individual rights and remedies.

Following the above analysis, it is clear that FERPA is not the type of statute that creates individual rights and remedies. Instead, its enforcement provisions must be considered *Blessing*-style "systemwide" rights, meant to be enforced through the congressional spending power.

FERPA was introduced as an amendment to a school funding bill on the Senate floor. S. 1539, 93rd Cong., 2d. Sess. (1974). Sen. James L. Buckley introduced the amendment after reading an article in *Parade* magazine about an increase in data kept on students in school records that parents were not allowed to see, while government officials and select others were. 120 CONG. REC. S13951-54 (daily ed. May 9, 1974) (statement of Sen. Buckley); *see also* Diane Divoky, "How Secret School Records Can Hurt Your Child," *Parade* (March 31, 1974). Buckley introduced the amendment, which was never considered by a Senate committee, as a "Freedom of Information Act for children and parents" in order to give parents an opportunity to inspect

these files in order to know what information schools were keeping on their child, and to limit access to those files by others. 120 CONG. REC. at S13952.

Discussion on the amendment was limited to the fact that schools were making efforts to change the behavioral patterns and social values of children without their parents consent and were keeping secret records of assessments of students that parents were unable to view. 120 CONG. REC. S14579-94 (daily ed. May 14, 1974). It appears from the Congressional records that the amendment was passed by a voice vote later that day without any discussion of rights or remedies that would be granted to parents through the amendment. *Id.* at S14594.

Perhaps the lack of this type of discussion was due to the fact that the act was strictly a funding-related measure, with revocation of federal funds as the only enforcement mechanism. The text of the amendment clearly defines it as a funding statute: Each provision begins, "No funds shall be made available under any applicable program to any educational agency or institution . . ." *See* 20 U.S.C. § 1232g, subsections (a)(1)(A); (a)(2); (b)(1); (b)(2); and (e) (2001). Additionally, Sen. Sam Ervin Jr., a co-sponsor of the bill, said, "The penalties for noncompliance with this act would be a loss of Federal Funds." 120 CONG. REC. at S14584. Nowhere in the text of the statute is there any mention of any other remedy or grant any individual right of action for the release of records.

With respect to records disclosure specifically, FERPA requires that "[n]o funds shall be made available . . . to any educational agency or institution which has a *policy or practice* of permitting the release of education records," absent certain exceptions. 20 U.S.C. § 1232g(b)(1) (emphasis

added). Although this requirement is mandatory, the requirement is not that an institution may not release individual records; the requirement is only that the institution may not have a "policy or practice" of the release of records. Thus the statute is meant to remedy wholesale, systemwide abuses, not individual releases. Thus, under a *Blessing*-type analysis, the claim that a privacy right is created under FERPA would fail because *Blessing* states that § 1983 is meant to remedy the violation of individual, not systemwide rights.

The Eastern District of Pennsylvania applied this approach in finding that a "right" sufficient for a § 1983 claim was not conferred upon a law school graduate under FERPA in *Gundlach v. Reinstein*, 924 F. Supp. 684, 692-93 (E.D. Pa. 1996). The court held that because the statute was intended to address "systematic, not individual, violations" of students' privacy, there was no "unambiguous intention on the part of the Congress to permit the invocation of § 1983 to redress an individual release of records allegedly covered by FERPA." *Id.* at 692.

Likewise, the Court of Appeals of Washington agreed that the privacy "rights" under FERPA would fail under § 1983. *Doe v. Gonzaga University*, 99 Wash. App. 338, 992 P.2d 545 (Wash. App. 2000), *rev'd* 24 P.3d 390 (Wash. 2001). The Court of Appeals commented that the issue of whether such rights existed under FERPA was "more akin to *Suter* and *Blessing* than to *Wilder* and *Wright*." The court noted that FERPA only requires that a systemwide plan be put in place; "the law is not intended to ensure that 'the needs of any particular person have been satisfied.'" *Doe v. Gonzaga University*, 992 P.2d at 556 (*quoting Blessing*, 520 U.S. at 343).

Although the Washington Supreme Court, in reversing the appellate court, purported to follow the three-prong test from

Blessing, it did not analyze whether individual rather than systemwide rights were created by FERPA. The decision suffers from an oversimplification of the third *Blessing* prong; the court held that because institutions with programs receiving funding were bound to obtain student consent before releasing records, the prong was met. This analysis fails to distinguish between individual rights and systemwide failures leading to a termination of funding – the very heart of the *Blessing* decision. *Gonzaga*, 24 P.3d at 401. Instead, in cursory fashion, the court held that federal appellate decisions that have allowed a § 1983 right under FERPA were "well-reasoned" and "more persuasive" than an analysis under *Wright*, *Wilder*, *Suter* and *Blessing*. *Id.*

The Washington Supreme Court in *Gonzaga*, like the federal appellate decisions it relies on, including the decision by the Tenth Circuit in the case at bar, employs a quote from the FERPA drafters to show that individuals were meant to be protected by the Act: "The purpose of the Act is two-fold – to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." *Gonzaga*, 24 P.3d at 400; *Falvo*, 233 F.3d at 1211 (*quoting* Joint Statement in Explanation of the Buckley/Pell Amendment, 120 CONG. REC. 39862 (Dec. 13, 1974)).

However, this statement only demonstrates that like all spending power statutes, Congress intended some group to benefit from its legislation. In fact, FERPA is designed directly to establish systemwide programs, not protect individuals. Using the above quote to stand for the proposition that in this case Congress intended for individuals to be protected is to implicitly suggest that in other spending power legislation – such as the legislation at issue in *Blessing*

and *Suter* – Congress had no such intent, otherwise a statement plucked from the Congressional record stating that the Adoption Assistance and Child Welfare Act of 1980 was meant to protect foster and adoptive children would have sufficed to meet this element in *Suter*, for example.

Moreover, the two appellate decisions cited by the Tenth Circuit in the instant case for the proposition that a violation of FERPA may be the basis for a civil rights lawsuit under § 1983, *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990) and *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d. Cir. 1986), were decided prior to *Blessing* and *Suter* and thus do not benefit from the Court's explication of the difference between individual and systemwide rights. *Falvo*, 233 F.3d at 1210.

C. When it has intended to create privacy rights in a statute, Congress has specifically created remedies.

Congress has shown that when it wants to recognize a privacy right, it creates remedies for violations of that right.

For instance, the Privacy Act of 1974, 5 U.S.C. § 552a (2000), was, like FERPA, enacted to allow individuals to access records about themselves from federal agency files and to seek amendment of erroneous information. Like FERPA, it is also a record-keeping statute. It mandates certain management and storage procedures for information about individuals so that they can see what routine uses will be made of information about them that is located in federal agency files. But the Privacy Act spells out remedies for agency mismanagement of records on individuals, including damage awards. 5 U.S.C. § 552a(g).

The Drivers Privacy Protection Act, 18 U.S.C. § 2721 *et seq.* (2000), also provides for remedies, and like FERPA directly addresses others' disclosure policies. The DPPA was enacted by the federal government to mandate that states pass laws requiring that certain "personal" information in state driver records not be routinely disclosed by the state agencies which collected it, but instead be available only to several categories of recipients who are described in the legislation. 18 U.S.C. § 2721(a). It also provides for criminal fines and civil damages against persons who knowingly violate its provisions. 18 U.S.C. §§ 2723(a), 2724.

II. The wide-spread confusion surrounding the definition of "education records" covered by FERPA should be clarified to avoid serious misapplication of the law.

The ambiguous meaning of "education records" in FERPA and the dearth of legislative history about the meaning of this phrase, combined with inconsistent application of the law by courts and the Department of Education has lead to increased confusion by school administrators as to what records are covered by FERPA. Unfortunately, this often has the practical effect of closing access to records that clearly were not meant by Congress to be covered by FERPA. Additionally, closing access to all school records inhibits the ability of student and professional journalists to inform the public of the happenings of their school system.

A. Both schools and courts are confused as to what falls within the definition of "education records" and the Department of Education continues to add to the confusion.

The confusion over what sort of student records should be withheld under FERPA is evident in conflicting court decisions. For example, in *Louisiana v. Mart*, a Louisiana appellate court granted access to videotape of a fight on a school bus used in criminal prosecution to local television stations and newspapers because it found that FERPA did not cover these records. *Louisiana v. Mart*, 697 So.2d 1055, 1059-61 (La. Ct. App. 1997). However, a Florida appellate court denied a local television station access to a tape of a junior high school student who pulled a gun on a school bus during a fight under a state law similar to FERPA. *Tampa Television, Inc. v. School Board of Hillsborough County*, 659 So. 2d 331, 331-32 (Fla. App. 1995).

The Department of Education has added to the confusion surrounding the definition of "education records." For example, despite the rulings of several courts, all of which said that FERPA did not apply to campus crime records created by college and university police departments, the Department of Education continued to vigorously assert its position that such records were "education records." *See Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991); *Jones v. Southern Arkansas University*, No. CIV-90-88 (Columbia County Cir. Ct. May 10, 1991). The Department retreated only after a federal court enjoined it from making further threats to cut off federal funding to schools that complied with public requests for campus police records. *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1233-34 (D.D.C. 1991). In 1992, Congress amended FERPA to clarify campus crime reports were not included in the definition of "education records." Pub. L. No. 102-325, § 1155 (1992).

A similar disagreement continues on the issue of whether campus disciplinary records involving criminal acts

committed by students can be kept secret as "education records" under FERPA. The Department maintains that they do[2] while state courts say they do not. *See Red & Black Publishing Co. v. Board of Regents*, 427 S.E.2d 257, 260-62 (Ga. 1993); *Doe v. Red & Black Publishing Co.*, 437 S.E.2d 474 (Ga. 1993); *Ohio ex rel. The Miami Student v. Miami University*, 680 N.E.2d 956, 970-72 (Ohio 1997), *cert. denied*, 118 S. Ct. 616 (1997).

In a case addressing the disclosure of information related to National Collegiate Athletic Association violations, the Maryland high court held that information about unpaid parking tickets of student athletes and coaches must be open to the public under the state open records law. *Kirwan v. Diamondback*, 721 A.2d 196, 199-207 (1998). In doing so, the court rejected arguments by the university, supported by the Department of Education, which filed an *amicus* brief in the case, that the parking records of student athletes were exempt from disclosure under the state open records law in part because they were "education records" covered by FERPA. The Department of Education's inability to provide accurate guidance and the inconsistent court treatment of school records adds to the confusion among school personnel over what records are "education records" under FERPA.

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[2] The Department — relying on FERPA — has recently taken the unprecedented step of suing two Ohio public universities to prevent them from releasing student disciplinary records involving criminal activity requested by the Chronicle of Higher Education that the Ohio Supreme Court has ruled are public under state law. *United States v. Miami University*, 91 F.Supp.2d 1132 (S.D. Ohio 2000), *appeal docketed*, No. 00-3518 (6th Cir. April 27, 2000).

B. The legislative history indicates that lawmakers were primarily concerned about protecting records created by educators about a student's academic life.

Despite the courts' and schools' misapplication of the FERPA definition of "education records,"[3] the limited legislative history does provide some examples of "education records" intended to be covered by FERPA. Those examples include student IQ scores, medical records, grades, anecdotal comments about students by teachers, personality rating profiles, reports on interviews with parents, psychological reports, reports on teacher-pupil or counselor-pupil contacts and government-financed classroom questionnaires on personal life, attitudes toward home, family and friends. 120 CONG. REC. S13951, S13953 (daily ed. May 9, 1974); 120 CONG. REC. S14584, S14585 (daily ed. May 14, 1974). These examples demonstrate that in enacting FERPA lawmakers were concerned about protecting information created by educators and other school officials about a student's academic life – not shielding from public view virtually every action taken by an individual student when he or she was within a school's geographic border.

C. Whatever interpretation this Court follows, it should be careful to note that material created

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[3] "For the purposes of this section, the term 'education records' means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which - (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g (a)(4)(A).

by student journalists in the course of their work does not fall within FERPA's definition of "education records."

Unfortunately, the threat of a loss of federal funds (let alone the risk of a § 1983 action) combined with the general confusion surrounding the law have created an enormous incentive for schools to interpret, or misinterpret, FERPA broadly. Rather than risk the consequences or take the time to carefully sort out the law's requirements many schools simply take the easy way out by routinely denying access to information that would otherwise be publicly available. *See* Randolph, "Students Say Colleges Use Law to Hide Bad News," THE WASHINGTON POST, Nov. 30, 1989, at A22, col. 1. The Tenth Circuit's holding in this case will likely contribute to this knee-jerk reaction.

Across the country, schools have implemented policies based on a misguided interpretation of "education records" in an effort to comply with FERPA. One of the more troublesome provisions to surface in a number of school policies in recent years has been the extension of FERPA's "education records" definition to include material produced by student journalists for inclusion in their student newspapers, yearbooks or other student-edited media. For example, the Student Press Law Center has received a growing number of calls from students and teachers reporting that school administrators have adopted or threatened to adopt policies that would prohibit students from publishing student photos or names in their student newspapers and yearbooks unless parental consent is obtained. *See e.g., Quill & Scroll*, February/March 2001, at 15.

Administrators at such schools contend that student-edited media produced using school facilities or resources are

automatically transformed into "education records" that must be controlled and regulated like any other official school record. These administrators choose to ignore the obvious differences between student transcripts, test scores or psychological reports kept in teachers' desks or the school office and a news story about the winners of a school band competition written by a student reporter and published in the student newspaper. Under such a rationale, school officials — including college and university officials also subject to FERPA — would be forced to ban student photographers from taking and publishing photos from the latest football game in the student newspaper or graduation ceremony highlights in the student yearbook absent the prior written consent of the newsmakers or their parents. Unfortunately, the lack of clear guidance provided by FERPA itself — not to mention the confusion and "wriggle room" created by various court decisions and Department of Education interpretations — has been the inspiration for such bizarre results.

Such policies place an incredible and unconstitutional burden on the student media. Having to consult a list of "approved" students prior to reporting a news story is not only cumbersome, but essentially guts the integrity of the editorial process, where stories are published because they are fair, accurate and newsworthy, not because the subject has or has not consented to the use of his name or photo. To find otherwise would likely result in the elimination of student media programs at schools across the country because of the unworkable burden of obtaining consent from every parent or student in the school.

In the only case to directly address the issue of FERPA's application to student-edited media, a federal district court in New York rejected a school principal's claim that FERPA

required him to confiscate copies of the school paper because it contained "confidential information about students." *Frasca v. Andrews*, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979). The court agreed that the paper contained information that would otherwise fall within the scope of FERPA if revealed by school officials, but refused to extend FERPA to the student media, stating:

> "[T]he prohibitions of [FERPA] cannot be deemed to extend to information which is derived form a source independent of school records.... Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records."

Id.

While it is entirely appropriate that a school district or a university create a policy regarding the disclosure of student information by school officials, it is wrong to conclude that a student reporter — who is neither a school official nor an agent of the school — is subject to the same limitations in disclosing to his readers truthful information that he lawfully obtained during the newsgathering process. *Smith v. Daily Mail*, 443 U.S. 97, 102, 99 S.Ct. 2667, 2670, 61 L.Ed.2d 399 (1979) (finding that the government may not restrict the press from reporting independently gathered information where such information is newsworthy and accurate).

Amici urge the Court to clarify that information gathered by student journalists for use in a school-sponsored student newspaper, yearbook, magazine, Web site or other information medium, does not satisfy the second part of the "education records" definition. For even though copies of the publications may be maintained by the "educational agency or

institution," student journalists are not acting on its behalf. 20 U.S.C. 1232g(a)(4)(A)(ii).

Such an interpretation would be consistent with numerous lower court decisions finding that independent acts or editorial decisions by student journalists do not constitute "state action." For example, in *Yeo v. Lexington*, the First Circuit held that student editors' decisions refusing to run an advertisement did not constitute a "state action." *Yeo v. Lexington*, 131 F.3d 241 (1st Cir. 1997). The court held that, "If the actions by the students are themselves state action or may be attributed to the school officials and provide the basis for state action, the inevitable legal consequence will be some level of judicial scrutiny of the students' editorial judgments. The inevitable practical consequence will be greater official control of the students' editorial judgments. Both consequences implicate the students' First Amendment interests, which are far from negligible." *Id.* at 250 (*citing Hazelwood Sch. District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 252, 94 S.Ct. 2831, 2837, 41 L.Ed.2d 730 (1974)). *See also Leeds v. Meltz*, 85 F.3d 51, 54-55 (2d Cir. 1996) (finding no state action where school officials and students were sued over the decision by student editors of a newspaper in a state-supported law school to reject an ad); *Sinn v. The Daily Nebraskan*, 829 F.2d 662, 665 (8th Cir. 1987) (holding that there was no state action in a student editor's refusal to print an ad where the student paper "maintains its editorial freedom from the state."); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (finding a student newspaper's refusal to print an ad resulted in no state action where the students elected the editor and university officials did not control or supervise editorial judgment about what to publish).

Finally, it should be noted that FERPA has been on the books for over 25 years. During that time student journalists across the country have produced millions of newspapers, yearbooks, literary magazines and Web sites. These student media have routinely and naturally included news and information about other students and the school community. Indeed, the American student press has a long and proud history, dating back to the early days of this nation,[4] of providing news and information of special interest to our young citizens — and of introducing them to the important and vital role played by a free and independent press.

The interpretation now being given to FERPA by some school officials threatens the student media's continued viability. We urge the Court to point out that material created by student journalists in the course of their work should clearly be recognized as not falling within FERPA's definition of "education records."

D. Whatever interpretation this Court follows, it should be careful to note that release of school records to investigative journalists serves a valuable oversight function.

Release of school records to journalists is a necessary component of informing the public of the effectiveness of their local schools. Thousands of stories a year could not be

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[4] In fact, the first high school newspaper, *The Students Gazette*, was published on June 11, 1777, at the William Penn Charter School in Philadelphia. Stephen Weislogel, "The Student Gazette and its Successors," The School Press Review, Journal of the Columbia Scholastic Press Association, May, 1977.

written without access to schools and school records. For example, in a five part series of stories two *Akron Beacon Journal* reporters wrote about how public records helped them to find out who was influencing the state's law makers to increase aid to private schools through voucher and charter school programs while public schools continued to lose funds. *See* Dennis J. Willard and Doug Oplinger, *Whose Choice?*, AKRON BEACON JOURNAL, Dec. 12-15, 1999. In another report, a *St. Petersburg Times* reporter was able to get records through public records requests that showed a discrepancy between the actual average standardized test scores of Florida's children and the numbers publicly disseminated by the State Department of Education. The reporter discovered that the state was excluding the testing results of special education students, making the state's children appear smarter. *See* Diane Rado, *Testing Policy Raises Questions*, ST. PETERSBURG TIMES, May 23, 1999, at 1B.

Because of the strong need to inform the public about school issues, it is important that journalists continue to have access to these records. This Court should be careful to narrowly interpret FERPA so as not to restrict access to records that have information vital to the public's knowledge.

CONCLUSION

Amici respectfully urge that this court overturn the Tenth Circuit's determination that a § 1983 remedy is proper under FERPA, or in the alternative, define "education records" narrowly, so that enforcement of FERPA does not interfere with the First Amendment interests of the scholastic and professional news media.

This Court must carefully consider the implications of

allowing § 1983 claims on a records disclosure law like FERPA, and determine whether Congress creates a new privacy right comparable to a constitutionally mandated privacy right every time it acknowledges privacy interests. *Amici* assert that answering this question in the affirmative would have drastic, sweeping consequences for the public's interest in knowing how its government works.

Dated: August 23, 2001

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No. 00-1073

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

Owasso Independent School District No. I-011, *et al.*;
Petitioners,

v.

Krista J. Falvo;
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, NATIONAL ASSOCIATION OF FEDERALLY IMPACTED SCHOOLS, COLORADO ASSOCIATION OF SCHOOL BOARDS, KANSAS ASSOCIATION OF SCHOOL BOARDS, NEW MEXICO SCHOOL BOARDS ASSOCIATION, OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION, UTAH SCHOOL BOARDS ASSOCIATION

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STATEMENT OF INTEREST OF *AMICI* [1]

Amici are national associations that represent public and independent primary, secondary, and higher education institutions and the educators who serve them. *Amici* believe that to subject to FERPA regulation the peer-grading practice at issue in this case, as well as similar instructional techniques common in classrooms across the country, involving students at all levels, would impede education of students. It would also interpose courts in pedagogy, a field the American judiciary has soundly held to be educators' domain.

Founded in 1940, *amicus* National School Boards Association ("NSBA") is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation. The following federation member state associations from the Tenth Circuit also support Petitioners and represent similar interests in this case: Colorado, Kansas, New Mexico, Oklahoma, and Utah.

Amicus American Council on Education ("ACE") represents all sectors of American higher education. Its

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1/ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of all of the parties and letters of consent from counsel for the parties have been filed with the Clerk.

approximately 1,800 members include a substantial majority of colleges and universities in the United States. Since its founding in 1918, ACE has sought to promote high standards in higher education, in the belief that a strong higher education system is the cornerstone of a democratic society. ACE's initiatives address issues of national importance, ranging from higher education quality and affordability to the responsiveness in other respects of colleges and universities to the nation's needs.

The American Association of School Administrators ("AASA"), founded in 1865, has a membership of more than 14,000 educational leaders. AASA seeks to achieve the highest quality of public education through effective school leadership.

The National Association of Independent Schools ("NAIS") is a voluntary membership organization that represents over 1,100 independent pre-collegiate schools nationwide. NAIS strives to provide its schools with appropriate principles of good practice, promoting high standards of academic excellence, affordable access to independent education, and diversified school communities. NAIS initiatives reflect areas of national concern, particularly when they involve the consequences of member schools accepting federal funds.

The National Association of Federally Impacted Schools ("NAFIS"), founded in 1973, is a not-for-profit association representing the interests of more than 1,500 local education agencies which receive federal impact aid. Each member school district is governed by a locally elected school board, and together these school districts serve more than 15 million children.

SUMMARY OF ARGUMENT

The court of appeals held that Petitioners violated the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, because teachers in the Owasso Independent School District employed "peer-grading" in their classrooms. Peer-grading is an instructional technique, often used in the context of class discussion, in which students exchange papers while a teacher reviews in-class work or homework. Students mark answers, noting correct responses on classmates' papers. Many educators view peer-grading as a valuable instructional tool that enables students to learn from classmates and that permits teachers to use classroom time efficiently. Peer-grading is common nationwide in primary and secondary schools as well as college classrooms.

The court of appeals interpreted a provision of FERPA – which by its terms speaks only to "reveal[ing]" "records" "maintained" by schools, colleges, and educational agencies or their agents – as covering the common peer-grading practice. Under that court's interpretation, FERPA's elaborate procedures and stringent nondisclosure provisions would cover not only files and records kept in school offices, but would also reach evaluations assigned to homework, quizzes, tests, and other student work, even when the evaluation is never recorded in the student's school file or record. That holding contravenes the statute's plain meaning, defies common sense as confirmed by the legislative history, conflicts with the settled interpretation by the agency authorized to implement FERPA, and would entail massive federal regulation of conventional classroom interactions of teachers and students.

The court of appeals' novel interpretation would profoundly affect how teachers across the country educate students. It would bar not only peer-grading but also many

other commonly utilized, benign, and effective instructional methods that involve student review of others' work, teacher evaluation of work in a group setting, and the like. The effect of such a doctrine would be to proliferate lawsuits against school districts. And the holding is contrary to the overwhelming weight of authority that teachers' evaluations of students are not subject to judicial review.

The Court may reverse the court of appeals without determining the merits of Respondent's FERPA claim, because, as shown below, the provision at issue is not privately enforceable in an action under 42 U.S.C. § 1983. But even if Section 1983 were available to enforce FERPA, the school district defendant in this case would be immune from suit, because Respondent never established that the violations she alleged resulted from a pattern or practice of the Owasso School Board.

ARGUMENT

I. IN-CLASS PEER-EVALUATION AND SIMILAR EDUCATIONAL TECHNIQUES ARE OUTSIDE THE SCOPE OF FERPA.

The court of appeals erred in holding that the peer-grading instructional activity in this case violated FERPA. That holding rested on the court's determination that the grades students place on other students' work are "education records," a construction that would vastly expand FERPA's reach. The court's interpretation conflicts with the statute's plain meaning, legislative history, and interpretations by the federal agency authorized to implement FERPA.

A. In-class Evaluations by Students of Other Students' Work Are Not FERPA "Education Records".

FERPA defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). *See also* 34 C.F.R. § 99.3. Students who record grades on one another's papers do not "maintain" "records, files, documents and other materials." 20 U.S.C. § 1232g(a)(4)(A). To describe what students are doing in these circumstances as "maintaining" a record, as the court of appeals did, is contrary to the plain meaning of "maintain," which denotes "keep in an existing state (as of repair, efficiency, or validity)" or "preserve from failure or decline." *Webster's Ninth New Collegiate Dictionary* 718 (1990). Students who mark one another's homework papers and quizzes may *inscribe* grades and even temporarily *possess* them, but they do not keep them in a "state" of "repair, efficiency, or validity," nor "preserve [them] from failure or decline," and hence do not maintain them. Had Congress intended FERPA to reach notations made by students before they are placed in school files, it could have made FERPA apply to records "made" or "possessed" by such persons. It did not. Instead, Congress sensibly determined that FERPA reaches only records "maintained" by educational institutions and agencies or those who act for them. Because the grades at issue were not maintained by the student-graders, they were not education records when the students viewed them. On these grounds alone, the court of appeals' decision should be reversed.

The court of appeals believed that student grades become "education records" once they are recorded in a teacher's grade book. (Petitioners' Appendix at A-21.) On

that faulty premise, the court reasoned that grades students write on other students' work also are "education records," even before the teacher records them. In so holding, the court made two errors.

First, FERPA plainly provides that grade books and other records kept by teachers are *not* "education records" if "not accessible or revealed to any other person except a substitute." 20 U.S.C. § 1232g(a)(4)(B)(i). There is no evidence here that the teachers disclosed grade books, or any grades contained in their grade books, to anyone. To the contrary, the evidence relied on by the court of appeals showed only that students informed the teacher of other students' grades *before* the grades were ever recorded in a grade book. Thus, the teachers' grade books were not education records, because they were "not accessible or revealed to any other person." *Id.* How grades could be "education records" *before* being entered in grade books, as the court of appeals held, when FERPA plainly provides that they were not education records even after entry in the grade books, the court of appeals did not explain.

Second, even setting aside the express statutory exemption of grade books from FERPA's coverage, the court of appeals disregarded the distinction between disclosure of a grade contained in school files and disclosure of a grade that has not been recorded in such files. Yet that is precisely the distinction Congress drew in FERPA, which bars disclosure of education *records*, but not of all *evaluation* of student work, such as a grade given for a single assignment, that might eventually find its way into a student record. *See Falvo v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1201, 1202-1203 (10th Cir. 2000) (Kelly, J., dissenting from denial of rehearing en banc) (recognizing the "obvious difference between grades entered in a grade book (a collective record of the teacher), and the individual grades (on student papers) that are not recorded in a grade book" and the

"difference between a final grade placed on a transcript and the individual scores that determine the final grade").

To adopt the court of appeals' interpretation of "education records" would be destructive to sound, widespread classroom practice. On that court's view, a teacher's evaluation of a student would be an "education record" when made, if the teacher later recorded it in a written evaluation or notes placed in the student's file. That interpretation would render a vast, indeed staggering, amount of ordinary communication between students and teachers subject to FERPA's rigorous "education record" obligations. For example, suppose (1) Johnny hits Mary; (2) the teacher tells Johnny, in Mary's presence, "I do not approve of what you did"; and (3) the teacher later records the incident in Johnny's year-end evaluation. Under the court of appeals' view of education records, the teacher disclosed to Mary an education record pertaining to Johnny and thereby violated FERPA. A teacher could not compliment a child's artwork in the presence of other students were the compliment later recorded in an evaluation. And countless other illustrations of conventional and proper educational interaction would be forbidden. Of course Congress intended no such bizarre consequence; nothing in the language or history of FERPA suggests so. Yet such results follow under the holding below. Congress drew a clear line in FERPA between education "records" and the individual grades and other evaluations and assessments that are shared in the classroom. It is not the teacher's in-class assessment of classroom work that FERPA addresses; else federal law would be violated every time a teacher corrected a student's oral answer in class.

The court of appeals' reading of "education records" also cannot be harmonized with the structure of the statute. FERPA requires institutions to permit parents and eligible

students to inspect and review their "education records," 20 U.S.C. § 1232g(a)(1), and to challenge at a hearing disclosure of "education records" the student or parent believes "inaccurate or misleading." 20 U.S.C. § 1232g(a)(2). Those provisions are consistent with the view that "education records" are material recorded in school files; a school can provide a right of access only to records that it maintains.

By contrast, the view that "education records" includes grades a student writes on another's work, which may or may not subsequently be recorded in school files, would have peculiar and unprecedented consequences when applied to § 1232g(a)(1) and § 1232g(a)(2). First, it would be virtually impossible for schools to comply with those provisions, because they would be required to provide students and parents access even to evaluations not recorded in school files.

Second, that construction would vastly expand the scope of FERPA's hearing provision, by requiring schools to hold a hearing whenever a student or parent contended an individual grade on individual homework or other class work – or, for that matter, any other evaluation of student work, such as a teacher's comments – was "inaccurate" or "misleading." 20 U.S.C. § 1232g(a)(2). Yet FERPA accords students no right "to challenge their teachers' or educational institution's grading process." *Tarka v. Cunningham*, 917 F.2d 890, 892 (5th Cir. 1990). The legislative history is confirmatory:

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents or student could seek to

> correct an improperly recorded grade, but could not, through the hearing required pursuant to this law, contest whether the teacher should have assigned a higher grade because the parents or student believe that the student was entitled to the higher grade.

120 Cong. Rec. 39,864 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment). Giving parents and students the right to challenge the grade on every assignment would paralyze the assessment of student performance on which education at all levels depends. Congress plainly intended no such thing.

Surely, had Congress intended the FERPA hearing to be a vehicle for challenging unrecorded in-class peer evaluations, the statute or legislative history would at least have alluded to the wholesale federal intrusion into the conduct of education at every school.

Conferral of such a far-fetched right would, as well, collide with the overwhelming weight of judicial authority, which holds academic judgments that support evaluations of students to be "beyond judicial review." *In re Susan M. v. New York Law Sch.*, 556 N.E.2d 1104, 1107 (N.Y. 1990). *See, e.g., id.* at 1105; *Miller v. Hamline Univ. Sch. of Law*, 601 F.2d 970 (8th Cir. 1979); *Wright v. Texas S. Univ.*, 392 F.2d 728, 729 (5th Cir. 1968); *Ward v. New York Univ.*, No. 99 CIV. 8733, 2000 WL 1448641, at *3 (S.D.N.Y. Sept. 28, 2000); *Linson v. Trustees of the Univ. of Pa.*, No. Civ. A. 95-3681, 1996 WL 637810 (E.D. Pa. Nov. 4, 1996); *Alden v. Georgetown Univ.*, 734 A.2d 1103, 1108 (D.C. 1999); *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145, 1149 (D.C. 1985); *Napolitano v. Trustees of Princeton Univ.*, 453 A.2d 263, 275 (N.J. Super. Ct. App. Div. 1982); *Olsson v. Board of Higher Educ.*, 402 N.E.2d 1150 (N.Y. 1980); *Maas v. Corporation of Gonzaga Univ.*, 618 P.2d 106 (Wash. Ct. App. 1980).

Teachers throughout the nation would be required to abandon valuable, time-tested instructional methods if, as the court of appeals held, FERPA's nondisclosure provisions covered every score placed in class on a paper, quiz or homework assignment. For example, many teachers recognize student achievement by posting exemplary quizzes, papers or assignments in the classroom. That practice of sharing examples of excellent work benefits not only the student whose work is prized, but also other students. Similarly, a leading approach to writing instruction includes, as a vital component, peer editing, in which students exchange written work. *See, e.g.*, James A. Reither & Douglas Vipond, *Writing as Collaboration*, 51 College English 855, 855 (1989). There, students necessarily see the teacher's evaluation of other students' work. The holding below would not tolerate that pedagogically sound method and the better understanding of writing it imparts, although the method is integral to curricula in countless classrooms. *See, e.g.*, Robyn M. Gillies & Adrian F. Ashman, *The Effects of Cooperative Learning on Students with Learning Difficulties in the Lower Elementary School*, 34 J. of Special Educ. 19 (2000). Even routine classroom administration, such as having students distribute graded papers and assignments to classmates, would be precluded because student grades could be revealed and, according to the court of appeals decision, FERPA thus violated. When consequences so extreme and harmful are implicated by judicial interpretation, so must be doubt as to its validity.

B. The Court of Appeals Erred in Disregarding the Views of the Agency Charged with Implementing FERPA.

In enacting FERPA, Congress authorized establishment of and delegated to the U.S. Department of Health, Education and Welfare (now, in this respect, the U.S. Department of Education) Family Policy Compliance Office

("FPCO") authority to interpret FERPA and its implementing regulations and provide technical assistance to educational agencies and institutions to ensure compliance. 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.60. Since at least 1993, the FPCO consistently has interpreted FERPA not to cover the very peer-grading technique at issue here. (Petitioners' Appendix at F-2, 3.) Although it acknowledged the FPCO's settled view, the court of appeals rejected it as "not persuasive." (Petitioners' Appendix at A-20.) The court failed to give proper deference to the considered interpretation of the federal agency to which Congress delegated FERPA enforcement authority.

While not entitled to the same degree of deference as regulations or formal rulings, FPCO interpretations of FERPA in opinion letters "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift and Co.*, 323 U.S. 134, 140 (1944). Because the FPCO has "accumulated a considerable experience," *id.* at 137, in regulating under FERPA and "given the 'specialized experience and broader investigations and information' available to it," *United States v. Mead Corp.*, 121 S. Ct. 2164, 2175 (2001) (quoting *Skidmore*, 323 U.S. at 139), it was entitled to "some deference." *Reno v. Koray*, 515 U.S. 50, 61 (1995). The court below should at the very least have placed greater weight on the agency's directly pertinent interpretation of the statutory terms at issue.

The FPCO concluded that in-class peer-grading does not violate FERPA because the grades fall outside the statutory definition of education records. The FPCO Director is charged with investigating, processing, and reviewing complaints and violations under FERPA, and providing technical assistance to schools across the country. The Director's position on point is thus based upon specialized experience, and should be presumed correct

unless clearly in conflict with the statute's plain meaning. Moreover, to the extent that the FPCO's position interprets Department of Education regulations, it is controlling because not "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945). Further, there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Accordingly, the court of appeals erred by not granting deference to the FPCO's longstanding view.

If adopted, the determination of the court below to disregard the FPCO view would cause increased FERPA litigation. Since its enactment, FERPA has been subject to an extraordinary volume and variety of interpretations by students and parents. The FPCO has issued hundreds of opinion letters that interpret the statute. *See* Dixie Snow Huefner & Lynn M. Daggett, *Commentary: FERPA Update: Balancing Access to and Privacy of Student Records*, 152 Ed. Law Rep. 469 (2001); *see id.* ("What once seemed like a relatively straightforward statute has become a cumbersome set of requirements with ambiguous parameters."). A judicial failure to give deference to FPCO interpretations would invite complainants to litigate in courts throughout the nation the agency's voluminous technical interpretations of a statute that covers millions of students.

For these reasons, *amici* believe that Respondent's FERPA claim is without merit and that the court of appeals erred in upholding it. However, this Court need not address the merits of the FERPA claim, for the two reasons stated below.

II. CONGRESS DID NOT AUTHORIZE PRIVATE LAWSUITS TO ENFORCE THE FERPA PROVISION AT ISSUE.

Although the court of appeals recognized that FERPA itself confers no private cause of action, the court held that Respondent could bring this action under 42 U.S.C. § 1983. That is a question of first impression in this Court. Based on the analysis in *Suter v. Artist M.*, 503 U.S. 347 (1992), however, it is clear that Congress did not indicate the requisite intent to authorize private suits under Section 1983 to enforce FERPA.

In *Suter*, the Court announced the proper question to be answered in determining whether a private plaintiff may enforce a federal statute under Section 1983: "Did Congress, in enacting the [statute], unambiguously confer upon the * * * beneficiaries of the [statute] a right to enforce the requirement" at issue. *Id.* at 357. Where, as in *Suter* and here, Congress imposes obligations on states pursuant to its spending power, "'[t]he legitimacy of Congress' power to legislate * * * rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" and there can be "no knowing acceptance if a State * * * is unable to ascertain what is expected of it." *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (citations and footnote omitted). Thus, under *Suter*, for a court to find in FERPA a private enforcement right under Section 1983, Congress's intent to confer such a right must be "unambiguous[ ]". *Id.*

FERPA's text reveals utterly no Congressional intent – and certainly not the "unambiguous[ ]" intent *Suter* requires – to permit private enforcement of the provision at

issue here. [2] Nothing in the statute placed States on notice that individual alleged instances of unconsented disclosure of education records would subject them to private enforcement action by individual students and parents. To the contrary, the pertinent section simply provides, subject to various conditions and exceptions, that "[n]o funds shall be made available * * * to any educational agency or institution which has a *policy or practice* of permitting the release of education records * * * *" 20 U.S.C. § 1232g(b)(1) (emphasis added). FERPA thus merely conditions provision of federal funds on local education agencies' establishment of *policies or practices* that do not permit unconsented release of education records. *Francois v. Univ. of D.C.*, 788 F. Supp. 31, 33 (D.D.C. 1992). The statute certainly does not impose on school districts a duty to monitor the classroom methods of individual teachers to ensure that student records are never disclosed; and equally certainly it contains no unambiguous directive to that effect, as it must to authorize private enforcement under Section 1983. *See Suter*, 503 U.S. at 357.

Courts that have properly applied *Suter*'s teaching unanimously have held that an alleged violation of FERPA does not give rise to a private Section 1983 action. [3] *Meury*

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[2] Courts uniformly have held that FERPA itself provides no private right of action. *See Fay v. South Colonie Central Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 579 (5th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988); *Girardier v. Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977).

[3] The only federal appellate authority to the contrary that the court of appeals cited pre-dated *Suter* and relied on cases of this Court that analyzed the question in a manner far more receptive than *Suter* to inferring private enforcement rights. *See* Petitioners' Appendix at A-12 (citing cases). *Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997), a post-*Suter* case that the

v. Eagle-Union Community Sch. Corp., 714 N.E.2d 233 (Ind. Ct. App. 1999); *Norris v. Board of Educ. of Greenwood Community Sch. Corp.*, 797 F. Supp. 1452 (S.D. Ind. 1992). *See Grundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997). Since *Suter*, it has been clear that "when a provision in a statute fails to impose a direct obligation on the States, instead placing the onus of compliance with the statute's substantive provisions on the federal government, no cause of action cognizable under section 1983 can flourish." *Stowell v. Ives*, 976 F.2d 65, 70 (1st Cir. 1992). The FERPA provisions at issue here fall squarely into that category. By FERPA's express terms, Congress set forth a comprehensive mechanism according to which the U.S. Secretary of Education has sole authority to investigate and remedy students' and parents' allegations of FERPA violations. As the post-*Suter* courts recognize, "FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions and protections of FERPA; Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism." *Norris*, 797 F. Supp. at 1465.

The court below failed to apply the analysis in *Suter* because it believed that "any analytical additions announced in *Suter* are 'no longer to be followed' in light of post-*Suter* congressional action." (Petitioners' Appendix at A-12.) The case the court cited for that proposition refers to 42 U.S.C. § 1320a-2, but that provision by its terms only applies to "an action to enforce a provision of" Chapter 7, Title 42 of the United States Code, which pertains to Social Security. The cited provision therefore does not limit the precedential weight of *Suter* in construing other statutes codified elsewhere in the Code, such as FERPA, which is

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court did not cite, permitted a Section 1983 action to enforce FERPA, but failed to apply the controlling analysis of *Suter*.

codified in Title 20. The provision does indicate, however, that Congress apparently believed that *Suter* narrowed the "grounds for determining the availability of private actions." *See id.* Here, therefore, the court below should have applied the more restrictive *Suter* standard. Had it done so, it should have concluded that FERPA is not enforceable under Section 1983.

Instead, the court relied primarily on the two-part test articulated in the Court's prior decision in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). Under that test, "[a] plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.'" *Id.* at 508 (quoting *Wright v. Roanoke Dev. & Housing Auth.*, 479 U.S. 418, 423 (1987)). However, the court of appeals failed to apply that test in light of *Suter*, which added to a plaintiff's burden in such cases the additional showing that Congress "unambiguously" intended to confer private rights under the particular provision of the statute at issue. *See Arkansas Medical Soc., Inc. v. Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993); *Stowell*, 976 F.2d at 70. Applying the *Wilder* test in light of *Suter* clearly reveals that the requisite expression of Congressional intent is absent from the FERPA provision under which Respondent proceeds.

The first part of the *Wilder* test requires the Court to determine whether a federal statute gives rise to an enforceable right under Section 1983. To answer that question, the Court must ask: (1) whether the provision in question was intended to benefit the plaintiff; (2) whether the right protected by the statute is so "vague and amorphous" that its enforcement would strain judicial competence; and (3) whether the statute imposes a binding

obligation on the state. *Wilder*, 496 U.S. at 509. FERPA fails on all three counts. First, it requires only that participating school districts have a system-wide plan in place that does not permit the unconsented release of education records or personally identifiable information. 20 U.S.C. § 1232g(b). It does not by its terms prohibit individual disclosures or disclosures not pursuant to a policy or practice of the school district or educational agency that receives federal funds. Because the statute addresses only district-wide or institution-wide policies and practices, it is not clearly intended to ensure that "the needs of any particular person have been satisfied." *Blessing v. Freestone*, 520 U.S. 329, 343 (1997). Nor does it "bind the state" by putting school districts on notice that they are responsible for providing remedies to students for individual disclosure of education records by individual teachers. *See Suter*, 503 U.S. at 357. Finally, if FERPA creates enforceable individual rights, those rights are necessarily "vague and amorphous" because the statute does not specify what obligations education institutions and agencies have to prevent *individual* violations; it only conditions federal funding on recipients' not having certain *policies or practices*, such as preventing students and parents access to their own education records and revealing such records to unauthorized persons without consent.

The second prong of the *Wilder* test requires the Court to determine whether Congress has foreclosed private enforcement of the statute in the enactment itself. Here, Congress's explicit authorization of a funding remedy, with enforcement vested exclusively in the Secretary of Education, 20 U.S.C. § 1232g(f), (g), indicates that Congress did not "unambiguously" impose on school districts the added threat of private lawsuits to enforce individual disclosure of education records. The regulatory enforcement scheme authorized in § 1232g(g) of the statute is detailed and comprehensive.

First, the statute provides that it is "[t]he Secretary" of Education who "shall take appropriate actions to enforce this section and to deal with violations of this section." 20 U.S.C. § 1232g(f). Such "actions" may include "terminat[ing] assistance * * * if the Secretary finds there has been a failure to comply with this section," although the Secretary may only take that step if "he has determined that compliance cannot be secured by voluntary means." *Id.* Further, the statute provides that "[t]he Secretary shall establish or designate an office and review board within the Department [of Education] for the purpose of investigating, processing, reviewing, and adjudicating violations of [FERPA] and complaints which may be filed concerning alleged violations of [FERPA]." 20 U.S.C. § 1232g(g).

The Secretary's regulations established the FPCO within the U.S. Department of Education and charged it with investigating, processing and reviewing complaints and violations under FERPA. 34 C.F.R. § 99.60. In addition, the Secretary designated the FPCO to provide technical assistance to ensure compliance with FERPA. *Id.* Finally, the Secretary designated the Office of Administrative Law Judges to act as a Review Board under FERPA. *Id.*

Further, FERPA and its regulations allow parents and eligible students to file written complaints with the FPCO regarding alleged violations under FERPA. 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.63. The regulations specify the available complaint procedure and set forth the notice to be provided to the educational agency or institution and the complainant. *See* 34 C.F.R. §§ 99.64, 99.65. In addition, the regulations set forth the FPCO's responsibilities in the enforcement process, including that the FPCO provide written notice of its findings upon investigating a complaint and a statement of the specific steps that the agency or institution must take to comply with the FPCO's finding of non-compliance under FERPA. *See* 34 C.F.R. § 99.66.

Finally, the regulations set forth how the Secretary is to enforce decisions regarding complaints. *See* 34 C.F.R. § 99.67.

This comprehensive enforcement system authorized by FERPA demonstrates congressional intent to vest sole responsibility to remedy violations of FERPA in federal authorities. *See Norris*, 797 F. Supp. at 1465.

The same concerns that made the *Suter* Court reluctant to construe Spending Power legislation as conferring privately enforceable individual rights apply with at least equal force to the Spending Power statute at issue here. Legislation enacted under the Spending Clause is much in the nature of a contract, in that States agree to comply with federally imposed conditions in exchange for federal funds. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17. Plaintiffs in cases like this one are not parties to the contract. *Blessing*, 520 U.S. at 349 (Scalia, J., concurring). Such plaintiffs are at most merely third-party beneficiaries. As such, they were not entitled, under the law at the time Section 1983 was enacted, to sue upon the contract. *Id.* (*citing* 1 W. Story, *A Treatise on the Law of Contracts* 549-550 (4th ed. 1856)). Here, accordingly, Respondent has no right of action under Section 1983 because her ability to compel the school district to make good on its promise to the Federal government was not a "righ[t] * * * secured by the * * * laws" under Section 1983.

For these reasons, Respondent failed to state a cause of action by invoking Section 1983 to remedy the alleged FERPA violation.

III. SECTION 1983 HAS NO APPLICATION IN THESE CIRCUMSTANCES.

Even if FERPA were enforceable in a Section 1983 action, plaintiffs below failed to meet the basic requirements

for overcoming the Owasso Independent School District's governmental immunity from such a suit. Because the school district was immune – as were the individual defendants, which the court of appeals correctly held – the case should have been dismissed on those grounds.

To establish a valid Section 1983 claim against a local governmental body, a plaintiff must prove that official policy or custom is responsible for the deprivation of the plaintiff's rights. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978). It is not sufficient to prove that employees of the defendant agency violated a federal right. *Id.* Accordingly, the practice of peer-grading is not actionable unless it was done pursuant to an official policy or custom of the Owasso School Board.

Yet the court of appeals in this case did not rely on any evidence that the Owasso Independent School District, or its school board, had a formal policy authorizing or approving peer-grading. Nor did the court find any evidence of a school board "policy or practice" of denying parents or students access to educational records or releasing educational records without consent. In the absence of such an official policy, the school district was immune from a Section 1983 suit predicated on the actions of its employees. *Id.*

Claims such as those asserted in this case inflict "a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Nowhere is the distraction and expense of litigation more costly to society than in the field of education.

CONCLUSION

Amici respectfully submit that the decision below is unsound as a matter of law and dangerously adverse to the interests of education at all levels in the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, aka OWASSO PUBLIC SCHOOLS, *et al.*,
Petitioners,

v.

KRISTJA J. FALVO, PARENT and NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN and ERICA PLETAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO AS *AMICI CURIAE* SUPPORTING PETITIONERS

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This brief *amici curiae* is filed by the National Education Association ("NEA") and the American Federation of Teachers, AFL-CIO ("AFT"), with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF THE *AMICI CURIAE* [1]

NEA and AFT are nationwide employee organizations—with memberships of approximately 2.6 million and one million, respectively. A substantial majority of NEA and AFT members are employed as teachers in public school districts throughout the United States. These members—with the approval of their employing school districts—routinely use the grading practice that is at issue in this case—*i.e.*, the practice of allowing students to grade one another's homework and quizzes as their teacher goes over the answers aloud in class. Accordingly, NEA and AFT have a direct interest in the question of whether that grading practice is lawful—and in the antecedent question of whether students and their parents in any event can bring a 42 U.S.C. § 1983 action against NEA and AFT members who engage in the practice.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides, in pertinent part, that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents," other than in certain statutorily identified circumstances. 20 U.S.C. § 1232g(b)(1) (1994 & Supp. V 1999); *see also* 20 U.S.C. § 1232g(b)(2).

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[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or filing of this brief.

The United States Court of Appeals for the Tenth Circuit held that the grading practice complained of by respondent falls within this statutory proscription, because—by its "plain language"—FERPA's definition of "education records" encompasses the grades at issue, thus prohibiting the "release" of those grades to fellow students without parental consent. 233 F.3d at 1218; *see also id.* at 1215.[2]

Before reaching "the merits of [respondent's] FERPA claim," *id.* at 1211, the Court of Appeals raised *sua sponte* the antecedent "[j]urisdiction[al]" question of whether "a [claimed] violation of FERPA may be the basis for a civil rights lawsuit under 42 U.S.C. § 1983," *id.* at 1210. The court below answered this question in the affirmative, concluding that: (1) "20 U.S.C. § 1232g(b)(1) creates an enforceable right within the meaning of § 1983," *id.* at 1211[3]; and (2) "Congress did not impliedly foreclose a § 1983 remedy by creating a comprehensive remedial scheme within FERPA itself," *id.* at 1212.

The Court of Appeals answered this antecedent jurisdictional question incorrectly. Under this Court's precedents, a § 1983 claim predicated on the alleged violation of a

---

[2] Subject to certain enumerated exceptions, FERPA defines "education records" as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

[3] In reaching this conclusion, the Court of Appeals stated that a three-part inquiry is required by *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990), and then reasoned as follows: *first*, that "[t]he plain language of the relevant provision of FERPA, 20 U.S.C. § 1232g(b)(1), reveals that it is intended to protect the privacy of students and their parents"; *second*, that "the provision reflects a binding obligation on schools, rather than a mere congressional preference for a certain kind of conduct"; and, *third*, that "the interest which [respondent] asserts is neither vague nor amorphous and is thus within the competence of the judiciary to enforce." 233 F.3d at 1211.

statutory provision will lie only where—at an irreducible minimum—the statutory provision in question can be read to create an enforceable federal right of some kind in favor of the party making the claim. FERPA, 20 U.S.C. § 1232g(b)(1) can *not* be read to create an enforceable federal right of any kind in favor of students and their parents, because this section is phrased—not in "'rights-creating' language," *Alexander v. Sandoval*, 532 U.S. ___, 121 S. Ct. 1511, 1521 (2001)—but rather as a directive to the Secretary of Education to withhold federal funds from any educational agency or institution that engages in a policy or practice proscribed by that statutory provision. For this reason, the judgment below should be reversed, and the case remanded with instructions to dismiss respondent's putative § 1983 action alleging a violation of FERPA, 20 U.S.C. § 1232g(b)(1). *Infra* pp. 4-10.

Assuming, *arguendo,* that the Court does not dispose of this case on the above ground, the court below in any event erred in holding that the challenged grading practice violates FERPA, 20 U.S.C. § 1232g(b)(1). As to this issue, we essentially defer to petitioners, and supplement their submission by emphasizing only one point. While Congress certainly would be at liberty to conclude that the privacy interests of students vis-à-vis other students outweigh the educational benefits of the challenged grading practice—and on that basis provide federal funds only to school districts that do not allow their teachers to use the practice—federalism principles dictate that Congress speak "unambiguously"/"with a clear voice" if that is its policy judgment and chosen legislative solution. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Court of Appeals implicitly concluded that FERPA satisfies this clear-statement rule with respect to the challenged grading practice—inasmuch as it found the practice to be at odds with FERPA's "plain language"—but that implicit conclusion cannot bear scrutiny. *Infra* pp. 10-13.

ARGUMENT

I.

By its terms, 42 U.S.C. § 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." This Court held in *Maine v. Thiboutot*, 448 U.S. 1 (1980), that § 1983 "safeguards certain *rights* conferred by federal statutes." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis added). Thus, "[i]n order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id.* (emphasis in original).

"Whether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action cases, the Court also has asked, since *Cort v. Ash*, 422 U.S. 66, 78 (1975), whether 'the statute create[s] a federal right in favor of the plaintiff.'" *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 433 (1987) (O'Connor, J., dissenting). *See also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 526 (1990) (Rehnquist, C.J., dissenting) ("For relief to be had either under § 1983 or by implication under *Cort v. Ash, supra*, the language used by Congress must confer identifiable enforceable rights.").

Inasmuch as the inquiry into whether a statutory provision creates enforceable federal rights is coterminous in the § 1983 and implied-right-of-action contexts,[4] it is proper to look

[4] Because both of the above-cited quotations affirmatively embracing this proposition are from dissenting opinions, we feel compelled to note that neither the majority in *Wright* nor the majority in *Wilder* took issue with this proposition. To the contrary, in each case, the majority undertook a statutory analysis akin to that required in implied-right-of-action cases under *Cort v. Ash* in order to determine whether the operative statutory provision created the enforceable federal right asserted by the putative § 1983 plaintiff; in each case, the majority simply read the operative statutory provision differently than the dissent. *See Wright*, 479 U.S. at 429-32; *Wilder*, 496 U.S. at 509-20. And indeed, any doubt that this Court's precedents stand for the proposition affirmatively embraced by the *Wright* and *Wilder* dissenters is laid to rest by the Court's subsequent decision in *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992), in which the Court—having concluded that the statutory provision in question did not create the enforceable federal right claimed by the plaintiff *for § 1983 purposes*—went on to conclude that the question of whether that statutory provision gave rise to an implied right of action in favor of the plaintiff under *Cort v. Ash* could "be disposed of quickly" in the negative. *See also Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 29 n.12 (1982).

to the Court's implied-right-of-action cases to determine whether—for § 1983 purposes—FERPA, 20 U.S.C. § 1232g(b)(1) creates an enforceable federal right of some kind in favor of students and their parents. The Court's three most closely on-point implied-right-of-action decisions since *Cort v. Ash*—including the latest decision in that line, *Alexander v. Sandoval, supra*—leave no doubt that the answer to this question is "no."[5]

In *Cannon* v. *Univ. of Chicago*, 441 U.S. 677 (1979), the Court held that plaintiffs alleging a violation of § 901(a) of Title IX of the Education Amendments of 1972 have an implied right of action to enforce that provision—which provides, in pertinent part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. In so holding, the Court attached near dispositive weight to the fact that § 901(a) of Title IX is phrased in language evincing a congressional intent to confer identifiable rights on a discrete class of persons (*i.e.*, persons discriminated against

[5] The many implied-right-of-action decisions we leave out buttress this conclusion, *see, e.g.*, *California v. Sierra Club*, 451 U.S. 287, 292-98 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-24 (1979).

on the basis of sex by certain recipients of federal funds)—noting that "[w]ith the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." *Id.* at 690 & n.13, 693-94. Dispelling any doubt as to the significance of such rights-creating language, the Court added that "[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* at 691-93.[6]

Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981), involved a federal construction contract that did not contain a prevailing wage stipulation because it had been administratively determined that the work in question did not come within the ambit of the Davis-Bacon Act. Employees working under the contract sought to challenge the absence of the stipulation and recover back wages, but the Court held that § 1 of the Davis-Bacon Act did not create an implied right of action in their favor. That holding was based on the analysis in *Cannon*:

> The Court consistently has found that Congress intended to create a cause of action "where the language of the

[6] In this regard, the Court drew further significance from the fact that "[i]n adopting Title IX in its present form, . . . Congress passed over an alternative proposal . . . that was phrased quite differently—as a simple directive to the Secretary of HEW" to withhold federal funds from educational institutions absent satisfactory assurances from those institutions that they would not discriminate on the basis of sex. 441 U.S. at 693 n.14.

> statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case." *Cannon* . . ., 441 U.S. [at] 690, n.13 . . . . Conversely, it has noted that there "would be far less reason to infer a private remedy in favor of individual persons" where Congress, rather than drafting the legislation "with an unmistakable focus on the benefited class," instead has framed the statute simply as a general prohibition or a command to a federal agency. *Id.*, at 690-692. Section 1 of the Davis-Bacon Act requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals. Since § 1 is simply "phrased as a directive to federal agencies engaged in the disbursement of public funds," 441 U.S., at 693, n. 14, its language provides no support for the implication of a private remedy. [450 U.S. at 771-73 (internal citations and footnotes omitted).]

Just last term, in *Alexander v. Sandoval*, *supra*, the Court held that private individuals do not have an implied right of action to enforce disparate-impact regulations promulgated by federal agencies pursuant to § 602 of Title VI of the Civil Rights Act of 1964. In support of this holding, the Court relied largely on *Cannon* and *Universities Research Ass'n*:

> Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." . . . It is immediately clear that the "rights-creating" language so critical to the Court's analysis in *Cannon* . . . is completely absent from § 602. . . . Far from displaying congressional intent to create new rights, § 602 limits agencies to "effectuat[ing]" rights already created by § 601. And the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person

regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." *California v. Sierra Club*, 451 U.S. 287, 294 (1981). Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn.* . . ., § 602 is "phrased as a directive to federal agencies engaged in the distribution of public funds," [450 U.S.] at 772. When this is true, "[t]here [is] far less reason to infer a private remedy in favor of individual persons," *Cannon* . . ., [441 U.S.] at 690-91. So far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action. [121 S. Ct. at 1520-21 (internal citations omitted).]

FERPA, 20 U.S.C. § 1232g(b)(1) is qualitatively different from the language that was found to create an enforceable federal right in favor of the plaintiffs in *Cannon*, and is on all fours with the statutory provisions found not to create such a right in *Universities Research Ass'n* and *Alexander*. Like those latter statutory provisions, 20 U.S.C. § 1232g(b)(1) is phrased not in rights-creating language, but rather as a directive to a federal agency engaged in the distribution of public funds: *viz.*, "No funds shall be made available [by the Department of Education] under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents." Accordingly, 20 U.S.C. § 1232g(b)(1) does *not* create an enforceable federal right of any kind in favor of students and their parents.[7]

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[7] Nor is this conclusion in any way contrary to the holdings of *Wright* and *Wilder*, *supra*: in each of those cases, the Court found that the operative statutory provision *was* phrased in language evincing a congressional intent to confer enforceable federal rights on the class of persons to which the plaintiffs belonged. *See Wright*, 479 U.S. at 430; *Wilder*, 496 U.S. at 510.

In reaching the opposite conclusion, the court below observed that, by its "plain language," 20 U.S.C. § 1232g(b)(1) "is intended to protect the privacy of students and their parents." 233 F.3d at 1211. This observation—which undoubtedly is correct—misses the point, as *Universities Research Ass'n* conclusively demonstrates. There, the Court recognized that, "[o]n its face," the Davis-Bacon Act "is a minimum wage law designed for the benefit of construction workers." 450 U.S. at 771. But, the Court added: "[T]he fact that an enactment is designed to benefit a particular class does not end the inquiry; instead, it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation." *Id.* To answer that question, the Court combed the relevant provision of the Davis-Bacon Act for rights-creating language, and, finding none, it concluded that Congress had not intended to create enforceable federal rights in favor of the construction worker plaintiffs—notwithstanding the fact that the provision in question "is intended to protect" those workers. *Id.* at 771-73. *See also Alexander*, 121 S. Ct. at 1521 ("[T]he focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection"); *California v. Sierra Club*, 451 U.S. 287, 294 (1981) ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries"); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) ("Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect [investment] advisers' clients does not require the implication of a private cause of action for damages on their behalf.").

In sum, this Court's precedents make clear that FERPA, 20 U.S.C. § 1232g(b)(1) does *not* create an enforceable federal right of any kind in favor of students and their parents. That being so, even assuming *arguendo* that the grading practice complained of violates 20 U.S.C. § 1232g(b)(1), respondent has not alleged the deprivation of any "rights, privileges, or immunities" within the meaning of 42 U.S.C. § 1983, and her putative § 1983 action fails at its inception. The Court of Appeals' holding to the contrary is erroneous, and should be reversed.[8]

II.

Turning to the merits of respondent's claim, we believe that the court below erred when it held that the challenged grading practice violates FERPA, 20 U.S.C. § 1232g(b)(1). In this regard, we essentially defer to petitioners, and make only one point in supplementation of their submission.

The grading practice at issue is widely used throughout the United States because many teachers—and their employing school districts—have found it to be educationally beneficial. The District Court identified certain of these benefits,[9] and

[8] Inasmuch as 20 U.S.C. § 1232g(b)(1) does not create an enforceable federal right of any kind in favor of students and their parents, this Court need not consider certain additional determinations made by the court below—specifically, *supra* p. 2 n. 3, that "th[e] provision reflects a binding obligation on schools, rather than a mere congressional preference for a certain kind of conduct," and that "the interest which [respondent] asserts is neither vague nor amorphous and is thus within the competence of the judiciary to enforce," *see Wilder*, 496 U.S. at 509; and, *supra* p. 2, that "Congress did not impliedly foreclose a § 1983 remedy by creating a comprehensive remedial scheme within FERPA itself," *see Suter*, 503 U.S. at 360 n.11; *cf. Blessing*, 520 U.S. at 346.

[9] The District Court noted, for example, that if teachers are not allowed to have students grade one another's homework and quizzes, and are required to do all such grading themselves, "students will receive their results after delay," denying them valuable immediate feedback. (Pet. App. C-6).

concluded that proscription of the practice "may have a detrimental effect upon both teaching and learning." (Pet. App. at C-6).

This is not to suggest that the practice is universally embraced by all teachers and school districts; it is not, and that is precisely the point. The question of whether to engage in this practice—and, if so, when and to what extent—is uniquely suited to local resolution by teachers and school districts on a case-by-case basis. That being said, we recognize that Congress would be at liberty to conclude—as a general proposition—that the privacy interests of students vis-à-vis other students outweigh the educational benefits of such a grading practice—and on that basis provide federal funds only to school districts that do not allow their teachers to use the practice.

Basic principles of federalism dictate, however, that where Congress wishes to use its spending power as a means of regulating in areas traditionally entrusted to local control (and public school education certainly is such an area), Congress must make its intentions unmistakably clear. As the Court explained in *Pennhurst*, *supra*:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly,

> cognizant of the consequences of their participation. [451 U.S. at 17 (internal citations and footnote omitted).]

See also e.g. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

The court below implicitly concluded that FERPA satisfies this clear-statement rule with respect to the challenged grading practice—inasmuch as it found the practice to be at odds with FERPA's "plain language"—but that implicit conclusion cannot bear scrutiny. As petitioners have shown in their brief—and we will not burden the Court with a repetition of that showing here—the statutory language cuts strongly against the Court of Appeals' conclusion that the challenged grading practice violates FERPA. By no stretch of the imagination, however, can it be said that the Court of Appeals' conclusion flows *clearly* and *unambiguously* from FERPA's language, such that no school district receiving federal funds could help but be aware of its obligation to prohibit its teachers from using the practice. *Compare South Dakota v. Dole*, 483 U.S. at 208.

Indeed, the Court of Appeals' implicit conclusion that this Court's clear-statement rule is satisfied here is belied by the "longstanding" view of the federal agency responsible for FERPA's administration—the Department of Education—that FERPA, 20 U.S.C. § 1232g(b)(1) does *not* "prohibit students from grading other students' homework or tests in class because such papers and grades are not 'maintained' by the school at that point and therefore are not 'education records' within the meaning of the statute." Brief for the United States on Petition for a Writ of Certiorari at 17. As the *Pennhurst* Court found in analogous circumstances:

> [I]t strains credulity to argue that participating States should have known of their "obligations" under § 6010 [of the Developmentally Disabled Assistance and Bill of Rights Act of 1975] when the Secretary of HHS, the governmental agency responsible for the administration

> of the Act and the agency with which the participating States have the most contact, has never understood § 6010 to impose conditions on participating States. Though Congress' power to legislate under the spending power is broad, it does not include surprising States with postacceptance or "retroactive" conditions. [451 U.S. at 25.]

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, A/K/A OWASSO PUBLIC SCHOOLS; DALE JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT; LYNN JOHNSON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSISTANT SUPERINTENDENT; RICK THOMAS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRINCIPAL,

Petitioners,

v.

KRISTJA J. FALVO, AS PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN, AND ERICA PLETAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* CAPITOL RESOURCE INSTITUTE, CITIZENS FOR BETTER GOVERNMENT, IN SUPPORT OF RESPONDENT

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Respondent.

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BRIEF OF *AMICI CURIAE* CAPITOL RESOURCE INSTITUTE, CITIZENS FOR BETTER GOVERNMENT, IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE* [1]

Capitol Resource Institute (hereinafter referred to as "CRI") is a nonprofit organization that develops positive

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, no counsel for a party authored this brief, in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

policies that affect culture and government in the State of California. CRI advocates on issues that affect families. They further provide a variety of services and products that educate the public on legislation and governmental policy. CRI provides commentary to more than 30 radio stations in California and offers expert analysis and commentary on key issues of public policy.

Citizens for Honest Government (hereinafter referred to as "CHG") is a California-based organization dedicated to protecting the family unit and to the development of policies and laws that serve this interest. CHG is a dba of Creative Ministries, a nonprofit organization.

SUMMARY OF ARGUMENT

Little could be more important to our Nation than the role that a child's parents play in the intellectual upbringing of a child. Indeed, the education of a child will mold the child's response to the world about them and comes to bear on the very health and vitality of this great Nation, now and in the future. This case brings to the forefront of constitutional analysis the issue of whether the Family Education Rights and Privacy Act [2] (hereinafter referred to as "FERPA") is a manifestation of the fundamental underpinnings of a society that begins and ends with individual families. If FERPA meets the charge of manifesting important public values, it follows that it should create or embody an enforceable right as against those who would violate its provisions. Logically speaking, this right is best realized through 42 USC § 1983.

More specifically, this case places this Court in the position of making a determination as to who are to be the primary participants in a child's education. The primacy to be given to parents in terms of having the right to be the "first on the scene" in terms of a child's academic performance derives

[2] 20 USC § 1232g, *et seq.*; 34 CFR 99.1, *et seq.*

from the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. FERPA embodies these Constitutional principles and creates a uniform legal standard by which students, parents, and schools can guide their dissemination of information concerning, and discussions of, a student's academic progress.

FERPA, by logical operation, respects the fundamental right and liberty interest of a parent to be at the forefront of their child's education and to immediately address any problem with a child's grades or other recorded academic performance. When a teacher or student is allowed to call out the grade [3] of a student or to disclose other information protected under FERPA, without notice to a parent, a fundamental interference with the parent's penultimate right to address academic performance occurs. Once the grade is called out, or other academic performance information is disclosed, the parent is temporarily no longer in control of the educational upbringing of his/her child and the intellectual success and potential of the child becomes tainted by peers, the teacher, and the grading student. The parent is left in the uncomfortable position of having to "unring" a bell that they did not toll.

Petitioners' interpretation and application of FERPA contravenes constitutional precedent and, if condoned, would set a horrible precedent for this Nation. A ruling in favor of Petitioners would promote the idea that the state has a higher interest in the development of children than does the individual family unit. Indeed, the State would become divested from its origin in representative government and

[3] *Amici* herein do not argue the issue of whether a "grade" is a record in and of itself since other *amici curiae* and Respondents have addressed this issue in elaborate detail. This brief seeks to address the importance of FERPA to parental rights and the ability of parents to meaningfully participate in the education of their children.

become an uncontrollable Leviathan [4] in matters of education. If given this status, teachers and peers would play a primary role in evaluation of academic performance and the parent would enjoy substantially less than a secondary role in this process.

In order to fulfill its constitutional obligations [5] to parents, a school district must accept that a student's grades are "education records" under FERPA. Once the records are properly deemed to be "records," the power of a parent to address issues arising from those records can be reinstated and the parent can assume the role of a primary participant in addressing needed remedial reaction, if any, to a "bad grade."

Contrary to assertions by the Oklahoma Education Association, this case is not about an affront to the "free education" of this Nation's children. An "education" is truly guaranteed only where the parents are made an integral part of the process. "Education" involves an intimate relationship between students, parents and representatives of the State. Here, the Tenth Circuit has protected the right of parents to meaningful participation in the education of their children. As shown below, FERPA is the necessary gild on the existing structures of the right of privacy, the right to raise children, and the right to a free education.

Furthermore, this case is not about whether pedagogical traditions or customs are being unnecessarily challenged, as

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[4] Thomas Hobbes, *Leviathan* (pub. 1651) (1996, Ed. J.C.A. Gaskin, Oxford University Press, New York). See, also; Plato, *The Republic* (Trans. Benjamin Jowett, 1871) (1992, Quality Paperback Book Club, Random House, New York) pp. 59-62 [dialogue concerning the origin, notion, and individuals' relationship to the State]. *Also, see*; *Id.* at p. 285-286 [speaking to education and its relation to dialectical talent].

[5] *See, generally*; John Stuart Mill, *Utilitarianism, Liberty, and Representative Government* (pub. 1859) (1951, Dutton & Co., New York) pp. 178-179 [speaking to the co-equal obligations of education and the individual].

suggested by Petitioners. If the pedagogical traditions sought to be maintained by Petitioners do not bow before Constitutional principle, then they must cease to exist. Nowhere could this be more important than where the fundamental statutory and constitutional rights of parents and children are at stake. There is simply no pedagogical practice that could be declared important enough to overcome the fundamental and explicit civil rights of this Nation's parents.

While a school district might make the claim that the practices herein are relevant to correcting erroneous test responses, or necessary to creating an understanding of why a certain response is incorrect, the reality is that the pedagogical practice here actually prevents the parent from being truly able to respond to the *primary cause* of an incorrect test response. One need not be on the highest plane of academia to understand that incorrect responses on fairly drafted tests are attributable to the student's environment or to the conceptual and memory skills of the student. Indeed, the etiology of academic failure often rests at the very core of a student's humanity and the remedy to any problem in these areas first resides with the parents.

While it might make a teacher's grading tasks easier where students grade each others' papers, it does not make the job of the parent any easier. The parent is then left to combat the bad grade itself, the reaction of the child to the grade, the reaction of the grading student, the reaction of any students who heard the grade called out, the parent's own responsibility for any failures, the teacher, and school administrators.

Finally, and perhaps easily forgotten, is the fact that FERPA gives full credit to the intrinsic value of the privacy of a student's recorded academic performance. One can readily surmise that this, in part, is a recognition that a student's performance today is thought to be an incorruptible

investment [6] in their future as an American worker, parent, or professional.

Congress has, by enacting FERPA, insured that this investment will not be tainted by the corrosive factor of having unintended or unofficial third party interference. When the academic records of a child are protected, so too are the incremental investments in their future. These important investments are best represented and objectively determined by "grades" or other recorded measures of academic performance. Each grade achieved is a separate deposit which, if all goes well, will amount to a large investment in adult success. Any statute, including FERPA, which serves to protect these intangible investments must be carefully protected and given the power needed to fulfill its purpose. Petitioners' position would not provide these assurances.

I. PARENTS HAVE A DIRECT CONSTITUTIONAL STAKE IN THE EDUCATION OF THEIR CHILDREN: FERPA GUARDS THIS FUNDAMENTAL INTEREST FROM INTRUSION BY THIRD PARTIES

FERPA stands as a watchful sentry over the security of the relationship between parents and their children. As a matter of public policy, it insures that the State does not maintain more control than its constituent family units would be willing to give and places the highest value on a parent's responsibility to care for the educational development of a child. FERPA implicitly recognizes that interference with the ability to be responsible for the educational upbringing of

[6] *See, generally*; Allan G. Johnson, *Human Arrangements: An Introduction to Sociology* (2d Ed., 1989, Harcourt Brace Jovanich, New York) pp. 298-299 [with regard to the relationship between education and social mobility]. *Also, see*; John J. Macionis, *Society: The Basics* (3d Ed., 1996, Prentice-Hall, New Jersey) pp. 332-342 [discussion of academic standards and value of education to society].

one's child is just as important a right as that which allows one to beget a child. Simply stated, "freedom of personal choice in matters of family life is a fundamental liberty interest." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Accord; *Griswold v. Connecticut*, 381 U.S. 479 [recognition of fundamental rights in personal definitions of familial relations].

Moreover, this Honorable Court has specifically held that:

> "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

One can only assume that the "obligations" to be assumed by a child are those that are fulfilled by the child's intellectual and academic contributions toward the betterment of society. Inasmuch as one realizes that today's children are the Nation's future, it is also true that their upbringing is only an unfulfilled prophecy of that same future. Being so, it only makes sense that Congress and this Honorable Court do all possible to insure the security of each parent's role in this important process.

These very same sentiments were reverberated in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1943), wherein the Honorable Court stated that:

> "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include the preparation for obligations the state can neither supply nor hinder." *Also see, Parham v. J.R.*, 442 U.S. 584, 602 (1979).[7]

[7] *See, also, Stanley v. Illinois*, 405 U.S. 645, 651 (1972) [recognizing the interest of a parent in the management of the child's affairs]; *Quilloin*

Naturally, the phrase "custody, care, and nurture" of a child can only evoke a sense that a child's education rests at the very center of the fulfillment of parental responsibility. Indeed, it is a foregone conclusion that the nurturing of a school-age child will inevitably incorporate dialogue and decisive action relative to the child's academic performance. Without this uninterrupted dialogue, both the parent and the child risk the very success of the child as a functioning adult.

It also goes without saying that discussions about academic performance allow both child and parent to engage each other in a co-equal obligation and responsibility for the future of themselves and society as a whole. On the level of having a discernable obligation to society as a whole, familial dialogue about educational progress is one of the most important managerial functions any parent can assume and carry out. Ultimately, a parent's recognition of the importance of a child's academic performance is homage to the idea that each parent is responsible for contributing to the intellectual development of this entire Nation. Petitioners' desire to dilute the importance of a parent's role in addressing and remedying poor student performance will potentially lead to a negative effect on society.

Any mass failure to respect and carry out this function can lead only to a collective degradation of this Nation's future as a repository for intellectualism, academic integrity, and a

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v. Walcott, 434 U.S. 246, 255 (1978) [recognizing that parental rights are well established in American jurisprudence]; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) [referencing the fundamental liberty interest of natural parents in the care, custody and management of their children]; *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) [parental rights to direct education of children]; *Doe v. Irwin*, 441 F.Supp. 1247 (Mich., 1985) [acknowledging rights of parents as deriving from First, Fifth, Ninth and Fourteenth Amendments to the Constitution]; *In the Interest of Cooper*, 631 P.2d 632 (Kan., 1981) [temporary losses of custody of children are grievous].

legitimate desire to consistently progress in all facets of academia. This is not a simple "slippery slope" argument. Fulfillment of the right and obligation to be a responsible parent recognizes that a student's grade today is a harbinger of the grade that America's future will earn. One cannot deny that FERPA has an effect on all American students. Moreover, one cannot deny that the collective performance of all students is necessary to the success of our Nation. It is oft said, for good reason, that "a chain is only as good as its weakest link."

In addressing the issue of the specific role of parents in the upbringing of their children, this Court has also stated that:

> "It is plain that the interest of a parent in the companionship, care, custody, and a management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to the liberties which derive merely from shifting economic arrangements.' [cite]. . . .
>
> "The Court has frequently emphasized the importance of family. The rights to conceive and raise one's children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) . . . 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) . . . , and '[r]ights far more precious . . . than property rights.,' *May v. Anderson*, 345 U.S. 528 (1953) . . . ."

One of the best summarizations of these rights can be found in the following statement:

> "Among the most important of the liberties accorded this special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship. . . .

> The constitutional interest in the development of parental and filial bonds free from governmental interference has many avatars. It emerges in a parent's right to control the manner in which his child is reared and educated and in the child's corresponding right not to have the content of his instruction prescribed by the state. . . . And, above all, it is manifested in the reciprocal rights of parent and child to one another's 'companionship.'" *Franz v. United States*, 707 F.2d 582, fns. 53-57 (D.C. Cir., 1983).[8]

The *Franz* decision simply underscores the importance of the litany of cases that this Court has decided in the area of parental rights and obligations. FERPA simply insures that these rights are respected on the level of each family unit. As shown below, this protection extends to a myriad of other important rights and the healthy growth and success of all children.

Finally, on a common sense level one can readily recognize that many a tear has been shed over a child's poor grades, and many happy victories have been enjoyed because of a student's high academic performance. The intimacy of these family moments cannot be understated. Bad academic performance and parental inability to effectively address the issue bear the risk of creating overall instability in the family. It is undeniable that a child's academic grades are important to a family's pride. Bad grades often result in family shame.[9]

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[8] Citing, in part; *Quilloin v. Walcott*, 434 U.S. at 255; *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Stanley*, Id. at 405 U.S. 651; *Prince*, *Id.* at 166; *Parham*, Id., at 602-604; *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d.Cir., 1977).

[9] *See, generally*; Carl D. Schneider, *Shame, Exposure and Privacy* (1977, W.W. Norton & Co., New York)) pp. 29-55 [on a discussion of the nature of shame and the negative effect that it has on self image and relationships with other humans].

Indeed, the fundamental problem with how one might address a student's poor academic performance is even more compelling in assessing the degree of intimacy associated with a student's academic performance. All too often, the failure in performance may be due to learning disabilities, physical disabilities, and other objectively identifiable causes. Perhaps more important is the fact that, often, poor performance can be traced back to the parent. FERPA insures that the symptoms of such problems (e.g., recorded performance information) can be carefully addressed without jeopardizing the integrity of such an investigation or the self esteem of the child and parent. As a matter of public policy, the value of such a protection is beyond reasonable dispute. Indeed, this Court has already recognized that much of one's emotional enrichment derives from the ability to participate in "close ties" with others. See, generally; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) [for the proposition that personal relationships are afforded constitutional protection].

II. FERPA GUARDS THE FUNDAMENTAL INTERESTS RECOGNIZED IN PARENTAL RIGHTS' JURISPRUDENCE

If it is true that the right to raise children is more important that just about any other right, it is necessary that a fundamental framework of statutory protections be erected around this right in order to assure its existence and vitality. FERPA does this by recognizing that there is a legitimate privacy interest in the academic performance of a child. 20 USC 1232g(b)(1). *Also, see*; *Falvo v. Owasso Independent School District*, 233 F.3d 1203, 1211 (10th.Cir., 2000). To the extent that the privacy interest here relates to the relationship between a parent, child, and school, it can be readily compared to other rights which emanate from the most intimate realms of family life.

Were the position of Petitioners to be adopted, school districts would essentially be given free reign to ignore the legitimate interest of a parent in privately addressing the effect, outcome, and plans of action to be taken in relation to the academic performance of a child. An appeal to common sense nets the conclusion that there is a significant difference in addressing something as important as poor academic performance in private, as opposed to the public humiliation that comes from a child being identified as a "failure" by peers, teachers, and other members of society.[10]

Even if the parent chooses not to address a bad grade immediately, "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky*, supra, 455 U.S. at 753. In the present instance, FERPA recognizes this reality by implementing a consistent standard as to grading information disclosure and the parents's rights relative to such disclosure.

III. FERPA PROTECTS THE RIGHT TO SEEK PROFESSIONAL SUCCESS

To the extent that one is willing to accept the notion that a student's present day grades are the building blocks for possible admission to college or better job prospects, there is a fundamental interest in assuring that families be given a full and fair opportunity to address any problems concerning this issue.

In *Wilner v. Committee on Character*, 373 U.S. 96 (1963), this Court recognized that procedural due process required

[10] *See*; *Schneider*, supra.

"confrontation and cross-examination of those whose word deprives a person of his livelihood." *Id.* at 373 U.S. 103. Indeed, this is consistent with the idea that one does have the right, within their intellectual capacity and qualified experiences, to seek and enjoy a livelihood without unfair interference or deprivation by the State.[11] *See*, *generally*; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

A child's education is, on many levels, the cornerstone of success in adult life. However, the difference between the rights recognized in *Schware*, and the other cited cases, is that the gateway to adulthood is controlled by one's parents. Parents help shape and motivate the direction in which a child moves in terms of moral upbringing, educational opportunity, and future professional success. Indeed, the parent acts as a surrogate for insuring that the rights of the child are vigilantly protected, and to guard against the possibility that the State could take action that unfairly interferes with the right of equal opportunity, to achieve professional success.

Finally, Petitioners have suggested that no private action should be permitted for seeking remedies to FERPA violations. Poignantly, this Court has rejected the notion that,

[11] *See*; Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*, (1997, Cornell University) p. 11 [for the proposition that, "Everyone has a property right to 'his own person' and can extend it through sweat and labor. Thus what belongs to and is acquired by the self is private property and is distinctly separate from what is owned publicly or in common with all."]. E.g., to the extent that a student has "earned" a grade, they have, in some philosophical and real sense, established cognizable ownership over the grade and its byproducts. See, also; Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, FIRST AMENDMENT LAW HANDBOOK (1997, West Group, St. Paul, MN) pp. 557-594 [for the proposition that privacy has an economic value].

"[state action] aimed at . . . named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court." To the contrary, it was concluded that, "Our Constitution did not contemplate such a result." *United States v. Lovett*, 328 U.S. 303, 314 (1946). This being so, the Tenth Circuit Court of Appeals has faithfully fulfilled its duty to uphold the Constitution and has empowered the Respondents with an ability to address academic performance problems without the threat of embarrassment, humiliation, or trepidation.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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No. 00-1073

IN THE

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, A/K/A OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as superintendent; LYNN JOHNSON, individually and in her official capacity as assistant superintendent; RICK THOMAS, individually and in his official capacity as principal,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE [1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

in 1981. Eagle Forum ELDF's mission is to enable conservative and pro-family citizens to participate individually and collectively in the process of self-government and public policy making, so that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise. In particular, Eagle Forum ELDF defends the rights of parents in connection with the public school system.

SUMMARY OF ARGUMENT

The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2001) (hereinafter "FERPA" or "the Act") provides essential protection to "the privacy of students and their parents" in our historically compulsory school system. *Falvo v. Owasso Indep. School Dist.*, 233 F.3d 1203, 1211 (10th Cir. 2000). FERPA protects their privacy with respect to increasingly intrusive demands for information by public schools. The Act was one of the first and arguably the most successful federal privacy legislation, which in recent years has extended to financial records, *see* Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999), and to medical records, *see* Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936. Efforts to change FERPA or the other privacy legislation should be directed at Congress, not the courts.

Petitioners insist here on using a peer grading practice that is error-prone at best, and counterproductive at worst. In defending peer grading methods, petitioners threaten the effectiveness of FERPA in protecting families for nearly 3 decades. Petitioners ask this Court, not Congress, to narrow FERPA to allow peer grading, with those grades then announced to the entire class. FERPA should not be judicially narrowed, and parental rights sacrificed, on these facts.

FERPA is clear and unambiguous in protecting the "education records" of students against involuntary disclosure. Compromise of that confidentiality is neither justified for reasons of expediency nor for experimental teaching techniques. This right of confidentiality is an essential bulwark against the growing use of public schools and testing to inculcate attitudes and collect personal information. This right also serves to protect against the delegation of teaching obligations to unapproved and unqualified instructors for publicized grading.

Erosion of student and parental privacy rights is particularly unwarranted in the compulsory context of public schools. Parents are effectively the employers, by compulsion rather than choice, of the school employees who instruct and maintain records about the minor students. Generally required to participate, families are entitled to enforce and obtain their benefit of the bargain, including the privacy guaranteed by FERPA. Section 1983 relief to enforce Rule of Law in this context must remain available to families.

ARGUMENT

FERPA means what it says: protected "education records" are "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution . . . ." 20 U.S.C. § 1232g(a)(4)(A). Its definition is clear and broad. If the records "are maintained" by the school or its agent, then they must be protected. Neither the legislative history, the brief by the Solicitor General, nor the apocalyptic predictions by petitioners and *amici* can narrow that broad statutory mandate now. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). Part I below defends adherence to the plain meaning of the statute.

The court below was also correct in finding a 42 U.S.C. § 1983 cause of action here, which is particularly warranted due to the compulsory nature of public schooling. Petitioners do not challenge Section 1983 recourse, and it need not be addressed here. At any rate, the limited and non-exclusive enforcement scheme of FERPA permits Section 1983 recourse under well-established precedents. Part II explains why families must continue to retain a Section 1983 cause of action for violations of FERPA.

I. FERPA PROTECTION OF "EDUCATION RECORDS" IS UNLIMITED IN TIME OR PROCESS.

The restriction on disclosure by schools of education records is not limited in time or process. The restriction against disclosure of education records applies *at all times* and to *all school officials*. Schools are not free to bypass FERPA based on when or how they gather and maintain the records. As explained in Part A below, and emphasized by the Court below, FERPA does not include an exception allowing disclosure slightly prior to transferring the information to a centralized filing system. The teacher cannot broadcast that Johnny received a "D" on a history test a few seconds before transcribing that grade in his permanent file.

Nor is FERPA limited in scope based on the identity of the agent disclosing the information. A school cannot send Jill to fetch the results of Jack's school-required drug tests and pretend not to be responsible for embarrassing consequences. Where, as here, a school insists on using students to substitute for teachers in grading papers, the school must still comply with FERPA, as discussed in Part B below.

The Solicitor General's argument for a novel and narrow interpretation of FERPA does not withstand scrutiny. Part C demonstrates the flaws in that interpretation, which has logical defects and violates the statute. Moreover, the

Solicitor General's view inexplicably conflicts with the longstanding, consistent implementation of FERPA by the Department of Education's Family Policy Compliance Office (FPCO).

Construing FERPA broadly has worked extraordinarily well for nearly three decades, and the dire consequences predicted by petitioners and *amici* are illusory. FERPA has protected the political process, as in the examples of Vice President Quayle and President Clinton, against potentially embarrassing disclosure of candidates' education records. It has even helped preserve the integrity of the judiciary by preventing disclosure of education records at sensitive times. In this case, FERPA also has the positive effect of encouraging teachers themselves to grade student work, rather than using the weak substitute of classmates as graders. As shown in Part D, none of the catastrophes predicted by petitioners or *amici* are realistic.

Congress, not the courts, is the proper venue for seeking change to the plain meaning of FERPA. *See Ron Pair Enter.*, *supra*.

A. The FERPA Restrictions on Disclosure Apply at All Times.

FERPA defines its key term "education records" based on the type of information, not when it was received by the teacher or administrator. 20 U.S.C. § 1232g(a)(4). The touchstone is whether the materials "contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A). It is the *type* of information, not when it was received or disclosed, that determines application of FERPA.

Grades on coursework fall squarely within the plain meaning of the Act. Coursework grades are "directly related to a student," and thus satisfy the first prong of the

requirement. The grades at issue here were also maintained by a person acting for an educational institution—to wit, the teacher. It is inconsequential to the statute whether the disclosure occurs slightly before the teacher recorded the information. *See Falvo*, 233 F.3d at 1216 ("Congress intended FERPA to preclude a teacher from revealing to one student the grades of another when written in a grade book. . . . [I]t would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book . . . .").

Petitioners argue that:

> Until the paper has been scored and the number of correct or incorrect answers totaled, there exists no 'record' to be 'maintained.' If Congress had meant for the word 'maintain' to include the creation or collection of information, it certainly would have said so. Under the plain and ordinary meaning of the word 'maintain,' only those final grades that are recorded on the student's transcript and preserved in the educational agency's permanent, institutional records are 'maintained' within the meaning of FERPA.

Pet. Br. at 17. But Petitioners' conclusion is a non sequitur, even if no "record" exists until the paper has been graded. The papers are graded and the teacher does "maintain" the grades under the plain meaning of that word, and thus FERPA protects those grades. Congress need not enact special protection for "creation" or "collection of information", nor for information concerning papers prior to grading, to ensure protection.

Petitioners then argue that:

> The Tenth Circuit interpreted 'maintain' to mean the creation of information that may be preserved for a brief period of time to allow the teacher to make some use thereof. Yet by that logic, a student's work on a chalkboard could be an education record, because it is

> 'maintained' until the teacher has checked the work and given the student permission to erase it.

Pet. Br. at 18. But this does not accurately restate the decision below. Rather, the Tenth Circuit effectively enforced the plain meaning of the statute: grades, if maintained, must be protected. *See Falvo*, 233 F.3d at 1216-18. Non-graded material is unaffected by the decision below.

B. FERPA Restrictions on Disclosure Apply to Any "Person Acting for" an Educational Institution.

FERPA prohibits disclosure of statutory "education records" regardless of which school employee gathers or maintains the records. If the information is "maintained by an educational agency or institution or *by a person acting for such agency or institution*," then it is protected by FERPA. 20 U.S.C. § 1232g(a)(4)(A)(ii) (emphasis added). Anyone acting under delegation from an institution, such as a teacher, must still adhere to FERPA. The plain meaning of the statutory language is conclusive. *See Ron Pair*, 489 U.S. at 242 ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *Herman v. Hector I. Nieves Transport, Inc.*, 244 F.3d 32, 34 (1st Cir. 2000) ("In the absence of ambiguity, we generally do not look beyond the plain meaning of the statutory language.") (citing, *inter alia*, *Campbell v. Washington County Techn. Coll.*, 219 F.3d 3, 6 (1st Cir. 2000)).

The FPCO of the Department of Education has authority to implement FERPA, but the Solicitor General now inexplicably argues for a rejection of FPCO's own interpretation:

> Although the Department of Education previously has expressed a view of 'education records' that includes

> student work once it is collected by the teacher, we have concluded, on the basis of our review of the relevant statutory materials, as discussed below, that FERPA does not reach student work unless they [sic] are maintained as institutional records of the school.

Govt. Br. at 14 n.6 (reference omitted). This is error, both procedurally and substantively.

Substantively, FERPA does expressly govern student work maintained by a person, such as a teacher, who acts for an educational institution. 20 U.S.C. § 1232g(a)(4)(A)(ii). The narrow interpretation proposed by the Solicitor General would allow teachers to gather and disclose highly personal grades about students with impunity. A teacher could even disclose graded student work itself to the public, without prior consent, under this narrow view. That would violate both the plain meaning and spirit of FERPA.

Procedurally, it is unfortunate that the government fails to defend FPCO precedents here. Instead, the Solicitor General rejects the longstanding positions of the FPCO and argues for broad rights of teachers at the expense of parents and students. *See* Govt. Br. at 34 n.17 (arguing that teacher grade books should be exempt from FERPA). The Solicitor General even declares that its view "represents the position of the United States on this issue," unnecessarily throwing into uncertainty the continued vitality of the FPCO precedents, as discussed further below.

If there is to be any narrowing of FERPA, it should be done by Congress, not the courts or the Solicitor General.

C. The Solicitor General's Novel Interpretation is Flawed and Conflicts with FERPA and Longstanding Precedents.

The Solicitor General argues for a novel, and logically flawed, interpretation of FERPA. The government brief suggests that "student homework or classroom work" should

not qualify as records within the meaning of FERPA if not "retained or preserved as institutional records." Govt. Br. at 11. But such approach would fail to protect final and midterm exam grades and the exam papers themselves, which are often the most sensitive student records of all. This approach requires holding that teachers are not school officials, in direct conflict with FERPA and longstanding precedents of the Department of Education.

Many institutions, for example, allow students to take courses as "Pass/Fail" or otherwise conceal their exam grades from their permanent records. These options implicitly recognize the privacy interests in exam grades. However, the Solicitor General's interpretation would effectively deny the privacy of exam grades, while instead protecting the less meaningful course grades.

The government brief avoids the issue of exam grades. FERPA prevents a teacher from disclosing final exam grades, and likewise guarantees students access to their own final exam grades. The Act prohibits the posting, for all to see, of individually identifiable final exam grades, even if limited to grades that do not match an administrative record. Yet the Solicitor General's interpretation ignores the spirit and letter of FERPA, so that teachers could deny students access to their own grades while distributing those same grades to others.

That interpretation conflicts directly with FERPA, which expressly includes a teacher within its meaning of the term "school official." 20 U.S.C. § 1232g(b)(A) ("other school officials, *including teachers within the educational institution or local educational agency*") (emphasis added). Grades are highly personalized information, and FERPA ensures their protection and family access regardless of whether a teacher or other school official stores them.

The Solicitor General's interpretation is also flawed with respect to a student's school work, which requires parental

access as much as the grades assigned to the work. Family access to this work cannot be a function of where the school physically keeps that work. Parents are entitled under FERPA to access their children's work for which teachers record grades, with this access guarding against biased testing and grading. Yet the Solicitor General effectively argues for denial of FERPA access if a school official holds the student work in a place different from the central administrative files of the school. Govt. Br. at 11-14 & n.6. If the school uses a distributed filing system for student work, then that approach eviscerates FERPA.

The FPCO has interpreted and applied FERPA successfully for decades, but the Solicitor General's novel interpretation conflicts with its long-standing and well-reasoned precedents. The government brief specifically references and rejects two letter rulings of FERPA that held in favor of parents, and also rejects other unidentified letter rulings of FERPA. Govt. Br. at 34 n.17 (citing two identified letters by Leroy S. Rooker, and alluding to others). The government brief criticizes specific letters without attaching them, which we remedy here.

The Solicitor General first rejects a letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Mr. Julio Almanza (Jan. 28, 2000), which properly applied FERPA to protect privacy interests in student work collected by the teacher (App. at 1a). "FERPA would not generally permit a teacher to conduct a classroom learning exercise in which the teacher discloses personally identifiable information from one student's education records to one or more of the other students." *Id.* at 6a. This FPCO interpretation adheres to the spirit and letter of FERPA. Promulgated in January 2000, this advice in favor of family rights has not caused any known problems.

The Solicitor General next rejects a letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Mr.

Andrew Marko (June 25, 1998), which properly applied FERPA to guarantee parents' access to records maintained about their child by the teacher (App. at 9a). Govt. Br. at 34 n.17. In that case, a teacher refused to allow the parents to see records he maintained about their child. The case illustrates how schools often take an adversarial position against reasonable parental requests, and how essential FERPA is for parents. The public schools are taxpayer-funded for students effectively compelled to attend, and yet parents are often denied access to records gathered and maintained in this environment. FPCO has consistently applied FERPA to uphold parental rights in this and numerous other instances, which the Solicitor General unjustifiably seeks to reverse. *Id.*

D. The Predicted Catastrophes for a Broad FERPA Are Illusory.

The predictions that the sky will fall, if the ruling below is affirmed, are grossly exaggerated. *Amicus* Oklahoma Education Association, for example, insists that solo band performances, verbal presentations, the Socratic methodology of teaching, and "[a]ny routine pedagogical teaching and learning tool or practice" may be deemed a FERPA violation under the ruling below. OK Ed. Assoc. Br. at 16-17.

Petitioners declare that "[i]t is difficult to imagine how some courses could be conducted under the Tenth Circuit's reasoning. . . . Every student in the band or orchestra knows who is first chair on any instrument. . . . Moreover, the Tenth Circuit's decision would prohibit teachers from grading projects assigned to teams of students on the basis of the team's performance, because if the teacher gives a 'team grade,' everyone on the team will know that his or her teammates received the same grade." Pet. Br. at 36.

Amici National School Boards Association et al. go even further by claiming that "a vast, indeed staggering, amount of

ordinary communication between students and teachers" would become subject to FERPA under the decision of the court below. *Amici* National School Boards Ass'n Br. at 7. "A teacher could not compliment a child's artwork in the presence of other students were the compliment later recorded in an evaluation. And countless other illustrations of conventional and proper educational interaction would be forbidden." *Id.*

Not to be outdone, the Solicitor General worries about "the public display of science projects, the posting of a classroom chart that records the number of books read by each student throughout the school year, or ... the teachers' posting of homework or classroom assignments." Govt. Br. at 19.

Missing from these Chicken Little predictions, however, is any reference to disclosures of actual individual course grades. The ruling below does not affect presentations in front of class, posting of assignments, display of science projects, or any of the other suggested extrapolations. It does not affect team grades. The ruling below only applies to protecting privacy in grades of individuals which are recorded by the teacher. Such protection does not disrupt legitimate educational activities. As to petitioners' claim that chalkboard work could be affected, it is erased and hence not "maintained" as specified by FERPA.

These criticisms are moot anyway, because parental consent exists for virtually all positive public teacher feedback on student performance, from attaining first chair in the orchestra to being listed on the honor roll. Negative feedback on students, by announcing poor grades, rarely happens. To the extent a public school insists on publicizing poor grades, FERPA provides privacy protection without affecting the other activities cited by petitioners and their *amici*.

II. SECTION 1983 RECOURSE ALLOWS ENJOINING VIOLATIONS OF CLEARLY ESTABLISHED STATUTORY RIGHTS IN THE COMPULSORY CONTEXT OF PUBLIC SCHOOL.

Petitioners did not appeal the application of Section 1983 here, and do not even raise it in their brief. This Court need not address it. *See New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting) ("I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review."). Undeterred, several *amici* raise this issue, and argue for precluding victims of FERPA violations from enjoining continuing violations. As explained below, Section 1983 recourse here falls well within the Supreme Court requirements for its application.

Moreover, families are generally compelled to finance and attend public schools. *See Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (affirming the "general applicability of the State's compulsory school-attendance statutes," while carving a narrow religious exception). Once compelled, families need Section 1983 recourse as self-defense. The privacy interests in student records are at least as significant as the privacy interests in other personal information that this Court has recognized. *See Whalen v. Roe*, 429 U.S. 589, 598-600 (1977); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-59 (1977).

A. FERPA Satisfies the Three-Part Test for the Applicability of Section 1983.

FERPA easily satisfies the three-part limitation on Section 1983 actions. First, Section 1983 is inapplicable when the statutory provision at issue was not "'intend[ed] to benefit the putative plaintiff.'" *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990) (quoting *Golden State Transit Corp. v. Los*

Angeles, 493 U.S. 103, 106 (1989)). Second, Section 1983 is unavailable when the statute "reflects merely a 'congressional preference' for a certain kind of conduct, rather than a binding obligation on the governmental unit," *Wilder*, 496 U.S. at 509 (quoting *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)). Third, the plaintiff's interest cannot be so "'vague and amorphous'" as to be "'beyond the competence of the judiciary to enforce.'" *Wilder*, 496 U.S. at 509 (quoting *Golden State*, 493 U.S. at 106, quoting *Wright v. Roanoke Redev. and Housing Auth.*, 479 U.S. 418, 431-432 (1987)). *See also Dennis v. Higgins*, 498 U.S. 439, 448-49 (1991) (quoting and applying the three-part test as stated in *Golden State*).

None of these limitations applies to victims of FERPA violations. FERPA was indisputably designed to benefit and protect students, who are directly hurt by its violations. *See* 120 Cong. Rec. 39862 (Dec. 13, 1974) (Joint Statement in Explanation of Buckley/Pell Amendment) ("The purpose of the Act is two-fold—to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent."). That suffices for the purposes of Section 1983. As a noteworthy by-product, FERPA also benefits the political process by preventing manipulative and distorting disclosures of embarrassing education records about candidates and judicial nominees.[2]

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[2] Political objections to judicial confirmation sometimes resort to mockery of intellect, as directed at Supreme Court nominee Judge G. Harrold Carswell, whom the Senate narrowly rejected by a 51-45 vote. Floor manager Roman Hruska (R-NE), biting the bait, doomed it: "Even if he is mediocre there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?" *Nominations*, Senate Briefings, U.S. Senate, http://www.senate.gov/learning/brief_3.html (viewed 9/12/01).

As to the second prong of the test, FERPA does specifically bind government to protect the privacy of education records. Indeed, the FERPA requirements are expressly directed at government. They apply to "any educational agency or institution" receiving federal funds, 20 U.S.C. § 1232g(a), "any State educational agency," *id.* § 1232g(b), and "any public ... agency or institution which is the recipient of funds under any applicable program." *Id.* § 1232g(a)(3).

The nature of those obligations is clear and unambiguous, and does not suffer from problems of vagueness. The educational agency or institution is prohibited, *inter alia*, from "releas[ing] education records . . . of students without the written consent of their parents to any individual, agency, or organization" other than specifically excepted entities. *Id.* § 1232g(b)(1). Regulated schools, as custodians of highly personal education records, have a statutory obligation not to injure students and families through unauthorized release of those records.

FERPA thereby overcomes the three-part limitation above by imposing a clear obligation on government to respect privacy rights in education records. Students are typically minors required by government to provide the protected information. The reasonable expectation of privacy by families in these records is at least as great as the recognized expectation of privacy in other highly personal information. *See Whalen*, 429 U.S. at 599 (noting, in the context of medical records, that one has "the individual interest in avoiding disclosure of personal matters"); *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387-88 (10th Cir. 1995), *cert. denied*, 516 U.S. 817 (1995) (applying Section 1983 recourse to deceased spouse's diary excerpts).

Amici misplace reliance on *Suter v. Artist M.*, 503 U.S. 347 (1992), in arguing that FERPA does not surmount the above limitation. In *Suter*, the issue was whether the Adoption Assistance and Child Welfare Act of 1980 conferred

broad discretion on the States in administering foster care and adoption services. *See id.* at 362. In sharp contrast with FERPA, the Act in *Suter* merely required that "reasonable efforts will be made" by States to minimize dislocation of children from their families. *Id.* at 351, 358. Because the State had broad discretion in administering the program, the Court held that a Section 1983 private cause of action does not exist. *See id.* at 361-63. But where, as here, the federal statute is clear and unambiguous, victims of violations can sue to ensure adherence to the applicable law.

Amici are also mistaken in relying on *Blessing v. Freestone*, 520 U.S. 329 (1997). There the plaintiff sought, under Section 1983, blanket enforcement of an entire statutory scheme. In denying Section 1983 relief, the Court reaffirmed that the issue is the clarity and specificity of the obligation, not the existence of an express private cause of action. This Court drew a distinction between Section 1983 cases brought to enforce specific and narrow statutory provisions and suits for blanket enforcement of an entire statutory scheme. This Court thereby distinguished *Blessing* from *Wright*, in which plaintiffs were seeking to enforce a particular statute on rents, not the entire United States Housing Act.

B. It is the Clarity of the Statutory Obligation, Not an Express Cause of Action, that Establishes the Section 1983 Right.

It is the clarity of the statutory obligation, not an express private cause of action, that establishes the Section 1983 right to enforce the statute. Section 1983 protects against "deprivation of any rights, privileges, or immunities, secured by the Constitution and laws." 42 U.S.C. § 1983. The touchstone is whether those "rights, privileges, or immunities" are clearly "secured by the Constitution and laws," not whether they have an explicit private cause of action in the statute. The plain meaning of Section 1983 hinges on the clarity of the rights, not on a private right of enforcement. The

Constitution itself lacks explicit private causes of action, as do many of the laws to which Section 1983 rightly applies. *See, e.g., Kellogg v. City of Gary*, 562 N.E.2d 685, 696 (Ind. 1990) ("[W]e now hold there is a state created right to bear arms which includes the right to carry a handgun with a license, provided that all of the requirements of the Indiana Firearms Act are met. This right is protected by the Due Process Clause of the Fourteenth Amendment and is both a property and liberty interest for purposes of § 1983.").

Reinterpreting Section 1983 to apply only where the statute provides a private cause of action is undesirable in addition to being unprecedented. It would improperly shift the inquiry and focus from the clarity of the obligation to the existence of an explicit private cause of action. Section 1983 has and always will apply to "rights, privileges, or immunities" that lack an explicit private cause of action. Its limitation should be to those "rights, privileges, or immunities" that are clearly defined by law. The mischief to be avoided in Section 1983 actions is with respect to vague obligations, whereby the judiciary is effectively asked to create the substantive law. Here the legal obligation is clear, and there is no reason to allow violations of that obligation by denying Section 1983 actions.

Section 1983 enables victims of continuing FERPA violations to move directly to enjoin them, rather than taking the circuitous and perhaps impossible tack of suing the federal government to compel it to comply with FERPA. Rule of Law is enhanced by allowing Section 1983 recourse here.

C. The Enforcement Scheme of FERPA Does Not Preclude a Section 1983 Cause of Action.

Congress established a simple, non-exclusive administrative enforcement scheme under FERPA. It has two parts: first, the Secretary is required to enforce the statute but, second, the Secretary is prevented from taking immediate,

effective action such as withholding funds. This statutory framework reinforces the need for Section 1983 recourse, and cannot be read to preclude such an action.

In *Blessing*, this Court held that denial of a Section 1983 cause of action is warranted if Congress specifically foreclosed a Section 1983 remedy either (1) expressly by forbidding recourse to Section 1983 in the statute itself or (2) implicitly by creating a comprehensive enforcement scheme that is incompatible with individual Section 1983 enforcement. *Blessing*, 520 U.S. at 341 (citing *Smith v. Robinson*, 468 U.S. 992, 1005 n.9 (1994); *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1984)). As shown below, denial of a Section 1983 right is not justified here for either reason.

1. *FERPA Lacks an Express Prohibition on Section 1983 Recourse.*

Congress established mandatory, non-exclusive enforcement of FERPA by the Secretary of Education. "The Secretary shall take appropriate action to enforce this section . . . . " 42 U.S.C. § 1232g(f).

This mandate supports, rather than conflicts with, a Section 1983 cause of action for violation of FERPA. A private party would only recover under Section 1983 when (1) the Secretary fails to comply with its mandatory FERPA obligation or (2) the Secretary does comply but the school ignores him and continues to violate FERPA. Both scenarios are realistic possibilities in light of the state-conferred monopoly power held by public schools. When the school and the Secretary are in compliance with the Act, then a Section 1983 right is inconsequential.

At any rate, FERPA lacks an express prohibition on Section 1983 recourse.

2. *FERPA Lacks an Implicit Prohibition on Section 1983 Recourse.*

In *Blessing*, this Court held that without an express statutory curtailment of Section 1983 recourse, a defendant "must make the difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" 520 U.S. at 346 (quoting *Golden State*, 493 U.S. at 107 (citation and internal quotation marks omitted)). FERPA lacks a "carefully tailored scheme" inconsistent with Section 1983 recourse.

The *Blessing* holding continued:

> Only twice have we found a remedial scheme sufficiently comprehensive to supplant §1983: in [*Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981)], and *Smith v. Robinson*, 468 U.S. 992 (1984). In *Sea Clammers*, we focused on the "unusually elaborate enforcement provisions" of the Federal Water Pollution Control Act, which placed at the disposal of the Environmental Protection Agency a panoply of enforcement options, including noncompliance orders, civil suits, and criminal penalties. 453 U.S., at 13. We emphasized that several provisions of the Act authorized private persons to initiate enforcement actions. *Id.*, at 14, 20.

520 U.S. at 347. In *Sea Clammers*, the Court "found it 'hard to believe that Congress intended to preserve the §1983 right of action when it created so many specific statutory remedies, including the two citizen suit provisions.' 453 U.S., at 20." 520 U.S. at 347.

In *Smith*, the enforcement scheme of the Education of the Handicapped Act "permitted aggrieved individuals to invoke 'carefully tailored' local administrative procedures followed by federal judicial review." *Id.* (citing 468 U.S. at 1009).

The *Blessing* Court emphasized that an administrative enforcement scheme does not preclude a Section 1983 cause of action:

> We have also stressed that a plaintiff's ability to invoke §1983 cannot be defeated simply by "[t]he availability of administrative mechanisms to protect the plaintiff's interests." *Golden State*, *supra*, at 106. Thus, in *Wright*, we rejected the argument that the Secretary of Housing and Urban Development's "generalized powers" to audit local public housing authorities, to enforce annual contributions contracts, and to cut off federal funding demonstrated a congressional intention to prevent public housing tenants from using §1983 to enforce their rights under the federal Housing Act. 479 U.S., at 428. We reached much the same conclusion in *Wilder*, where the Secretary of Health and Human Services had power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law. 496 U.S., at 521. Even though in both cases these oversight powers were accompanied by limited state grievance procedures for individuals, we found that §1983 was still available. *Wright*, 479 U.S.at 427-428; *Wilder*, 496 U.S. at 523.

520 U.S. at 347-48.

The Court found the enforcement scheme in *Blessing* to be, as here, "through the Secretary's oversight." *Id.* at 348. Specifically, "up to 25 percent of eligible children and custodial parents can go without most of the services enumerated in Title IV-D before the Secretary can trim a State's AFDC grant. These limited powers to audit and cut federal funding closely resemble those powers at issue in *Wilder* and *Wright*." *Id.* The government's argument that a private plaintiff lacked standing to compel specific performance by the Secretary even reinforced the need for Section 1983 recourse. *Id.* The Court concluded that "[t]o the extent that Title IV-D may give rise to individual rights, therefore,

we agree with the Court of Appeals that the Secretary's oversight powers are not comprehensive enough to close the door on §1983 liability." *Id.*

The FERPA enforcement scheme here is even less comprehensive than the one at issue in *Blessing*, which was insufficient to preclude a Section 1983 action. Under FERPA, the Secretary of Education may not impose any fines for violations and cannot withhold or terminate *any* assistance in the first instance. "[A]ction to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 1232g(f). The Secretary has a procedural obstacle of determining that "compliance cannot be secured by voluntary means," which can take months or, more likely, years. *Id.* This renders the Secretary virtually powerless to assist a specifically injured student in enjoining a specific violation. While FERPA also authorizes the Secretary of Education to "establish or designate an office and review board within the Department" to investigate, process, review, and adjudicate FERPA violations, *see id.* § 1232g(g); 34 C.F.R. §§ 99.60-67, the remedy remains the limited one above. *See* 34 C.F.R. § 99.67 (2001).

FERPA therefore lacks a comprehensive enforcement scheme that would implicitly preclude Section 1983 relief.

D. Section 1983 Recourse is Also Necessary Due to the Compulsory Nature of Public Schools.

The public school system, the primary focus of FERPA, is not comparable to public assistance programs for which Section 1983 application has been rightly questioned. *See, e.g.*, *Blessing*, 520 U.S. at 349-50 (Scalia, J., concurring) (suggesting, in the context of a government assistance program, that recipients lack Section 1983 recourse as third-party beneficiaries).

Public schools represent the converse of government assistance programs. Families and taxpayers are required to fund the schools that their children then attend, typically by operation of law. *See, e.g., Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (requiring greater funding of certain schools in New Jersey); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989) (requiring greater support of certain schools in Texas, because "the legislature's responsibility to support public education is . . . constitutionally imposed"). The direct financial beneficiary of school funding is the school staff, not families with children there.[3] Indeed, for numerous schools it is debatable whether families even receive in value what they must spend. This is in sharp contrast to public assistance programs, where the recipients do receive a net financial benefit from the federal funding, and retain full choice whether to participate or not.

FERPA constitutes a mandate, through the political process, that contractors (the schools) respect parental instructions with respect to private records. *Cf. LePage v. Wyoming*, 18 P.3d 1177, 1181 (Wyo. 2001) (in affirming parental rights against State intrusion in schools, the Wyoming Supreme Court declared that "we . . . are confident in our presumption that parents act in the best interest of their children's physical, as well as their spiritual, health"). Students and their families are not the third-party beneficiaries suggested in *Blessing*. Rather, families are analogous to an employer, and FERPA is akin to a code of conduct for their employees—the school staff. Families, when unsatisfied, lack the option of terminating the relationship, so Section 1983 recourse is essential. *See, e.g., Fay v. South*

[3] *See Average Costs of a California School 1998-99*, California Dept. of Ed., http://www.ed-data.k12.ca.us/edfact_967.asp (viewed 9/13/01) (average cost per public school student in California is about $6000, the vast majority of which funds teacher and administrative staffs and consultants).

Colonie Cent. Sch. Dist., 802 F.2d 21, 33-34 (2d Cir. 1986) (relying on Section 1983 for redress against an overt violation of FERPA by a school).

The arguments by *Amici* National Education Association *et al.* and National School Boards Association *et al.* against a Section 1983 remedy have the school relationship backwards. Families fund schools, not vice-versa. Teachers are not required to attend public schools; families are required to fund them and participate. If teachers are unhappy with the prevailing code of conduct required by FERPA, then they can change jobs. Families do not generally have that option. As this Court has observed, extended compulsory education and enormous funding of public schools is a relatively recent development in American history. *See Yoder*, 406 U.S. at 226 (noting that until at least 1910, students generally satisfied State educational requirements by completing elementary school).

The contractual analogy suggested in the *Blessing* concurrence would only apply here as follows. Families are the payers, as required by law; school staffs would be the payees and beneficiaries. FERPA simply represents another channel for families to pay money to school staffs, while attaching modest conditions to protect privacy. In such a relationship, families and the Secretary each retain the right to direct the payees, just as a principal and his agent can each direct a contractor.

No anomaly exists here in allowing Section 1983 recourse in the absence of a private cause of action. In the public school context, there are no putative private entities that would enjoy immunity relative to a governmental counterpart. Petitioners and *amici* cannot have it both ways, implicitly defending compulsion on one hand but then arguing against a Section 1983 remedy on the other.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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October 12, 2001

APPENDIX

APPENDIX

UNITED STATES DEPARTMENT OF EDUCATION

Mr. Julio Almanza
Superintendent
Duluth Public Schools, ISD#709
215 North 1st. Avenue East
Duluth, Minnesota 55802

Jan 28 2000

Complaint No.____
Family Educational Rights
and Privacy Act

Dear Mr. Almanza:

This is to inform you of the finding in the complaint filed with this Office against the Duluth Public Schools, ISD#709 (District) by Ms.___. Ms. ____ alleged that the District violated the Family Educational Rights and Privacy Act (FERPA) when it disclosed personally indentifiable information from the education records of her daughter, ____, to a third party without her prior written consent. Specifically, Ms. ____ stated:

> My child's records were improperly disclosed. On October 6, 1998, Ms. ____ [a teacher at Ordean Middle School] handed out English tests taken by students on a previous day. These tests were given to other students to correct. Another student graded my daughter's test. My daughter's test was an education record and was improperly disclosed by giving it to another student. . . .

By letter dated February 16, 1999, this Office informed you of Ms. ____'s allegation and asked that the District provide a written response. Ms. Elizabeth A. Storaasli, attorney, responded on behalf of the District by letter dated March 19, 1999. In her letter, Ms. Storaasli states:

> Complainant ____ met with Superintendent Julio Almanza on October 7, 1998 with regard to her concerns about correcting of student tests in class. At that time she

did not specifically identify any teacher by name or classroom by location where the alleged violation occurred. She did not specify any incident which violated FERPA. She directed a letter to Superintendent Almanza dated October 13, 1998 which made general objection to student involvement in reviewing homework papers and tests, however, she identified no specific teacher or classroom in which this had allegedly happened.

The Complaint set forth in Director Rooker's letter dated February 16, 1999 is the first communication in which _____ identified Teacher _____ of Ordean Middle School as the source of _____ concern. Unfortunately, the delay in identifying the specific incident and data about which _____ complains has made it virtually impossible for Teacher _____ . . . to identify the test in question on October 6, 1998. ISD No. 709 maintains that the Complaint is too vague and thus places the School District and teacher in a position that essential factual information in order to respond to a nonspecific complaint is no longer available.

By letter dated November 30, 1999, this Office asked Ms. ____ to identify more specifically, which of her daughter's tests she is alleging that the District improperly disclosed. Ms. ____ stated that she could not identify any specifics regarding the test due to the passage of time since she submitted her complaint.

In her March 19 response on behalf of the District, Ms. Storaasli states further:

> ____ teaches Enriched English for eighth graders. She indicates that ____ . . . has been in her class during the 1998-1999 school year. She indicates that she administers approximately 4 to 5 tests per week in her English class . . . Teacher ____ has a weekly spelling

test which is preceded by practice tests or pre-tests. During the pre-tests the teacher dictates the words for the students, the students exchange papers, and identify for each other the words that are spelled correctly . . . . No grades are recorded of the practice tests, and there are no totals kept and no grades are assigned to those tests. Teacher ____ indicates that final weekly spelling tests are corrected only by the teacher not by other students, and then passed directly back to the students after being folded to cover the grade.

Teacher ____ also administers weekly vocabulary tests of 10 points each, but these are not corrected by students and are handed back in the same manner.

Teacher ___ also periodically administers chapter tests based upon current curriculum such as short stories . . . If student grading is involved in those tests, it is only on selected minor portions such as true-false, matching, etc., and students correcting are never aware of the student's totals or grade assigned by the teacher after correction of the entire test.

Teacher ____ indicates that as to those tests that are recorded in her grade book, after she has graded the number correct on each test and recorded the number in her grade book, she calculates the students' results on a curve, and posts the curve number on the blackboard with the indication of what number grades apply to the curve. She then passes back individual tests, advises the students to fold them in half, and after students have had an opportunity to review their tests results, the tests are destroyed. The exception to that is the final spelling tests and group projects completed by students together.

Teacher ____ indicates that ____ never called her by telephone, never spoke to her personally, nor attended a conference to meet with her regarding her procedure. ____'s child never mentioned to her any concern or

> objection to any process being used in the classroom. It is impossible for Teacher ____ to now identify which test ____ is referring to, and since October 6, 1998 was a Tuesday, she believes it was unlikely that it was a final weekly test.

Under FERPA, the term "education records" is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 20 U.S.C. § 1232g(a)(4); 34 CFR § 99.3 "Education records." There are several types of records which are specifically excluded by FERPA from the definition of education records, including "sole possession records" which will be discussed below. Under FERPA, a school may not generally disclose personally identifiable information from the education records of a minor student unless the student's parent has provided written consent. 34 CFR §99.30. There are several exceptions to FERPA's prohibition on nonconsensual disclosure of education records. However, none of those exceptions apply to this situation. Since Ms. ____ is unable to identify more specifically which of her daughter's education records or which test she is alleging the District improperly disclosed, this Office does not have sufficient evidence to further investigate her allegation. Therefore, this Office finds that the District did not violate FERPA as alleged by Ms. ____. Ms. ____ will be informed of our finding by copy of this letter.

Please note that in addition to conducting investigations of alleged violations of FERPA, this Office is responsible for providing technical assistance to educational agencies and institutions regarding FERPA. Notwithstanding the fact that Ms. ___ is unable to identify the test at issue, it appears that there may be some confusion on the part of the District regarding the definition of education records and what constitutes disclosure of an education record. Below is

technical assistance for the District to clarify FERPA in those areas.

In her March 19 response on behalf of the District, Ms Storaasli states:

> The opinion issued by LeRoy S. Rooker on Complaint No. ____ dated December 20, 1996 related to final graded papers, tests and projects which had been submitted to the teacher, evaluated and graded, and were then being returned to class members.
>
> . . . If ____'s complaint arises from a spelling pre-test, it has not yet been turned in to the teacher. If it arises from a portion of a chapter test, the teacher has not yet viewed or corrected any portions of the student's test. In either case, no grades have yet been assigned. If they are not "maintained" by the teacher or school, they have not yet become education records subject to FERPA . . . .

As stated above and in the December 20, 1996, finding in complaint number ____, the term "education records" encompasses records directly related to a student and maintained by an educational agency or institution. Please note that if a student's name or other personally identifiable information is provided on the test, then the test is directly related to that student. If the classroom teacher collects the test, then the test is maintained by the District and meets the definition of an education record subject to the privacy protections of FERPA. Also, if a test is collected by the teacher, even though the teacher has not reviewed or graded it, the test is an education record subject to FERPA. Please note that in the December 20 finding in complaint number____ this Office stated:

> . . . Clearly the *content's* of [the student's] written reports and projects, *as well as* the grades received for them, are education records as that term is broadly defined.

(Emphasis added.) Ms. Storaasli continues:

> If the test correcting exercise is pedagogical in nature and the teacher is utilizing it for the learning purposes of the entire class, whether graded or not, ISD No. 709 maintains that it is not educational data unless and until the grade is recorded in the teacher's grade book. An analogy could be that a teacher certainly has the authority to request student's to write spelling words or work math problems on the chalk board in the presence of other students and this would not be a violation of FERPA. Correction of spelling pre-tests and "true-false" or matching portions of chapter tests is pedagogical in nature and is used by the teacher for the learning purposes of the entire class.

FERPA protects personally identifiable information contained in student education records from improper disclosure to third parties by educational agencies and institutions. FERPA does not apply to disclosures of information by students or parents. Thus, Ms. Storaasli is correct that it would not be a violation of FERPA for a teacher to have a classroom learning exercise in which students "write spelling words or work math problems on a chalk board in the presence of other students." However, FERPA would not generally permit a teacher to conduct a classroom learning exercise in which the teacher discloses personally identifiable information from one student's education records to one or more of the other students. Thus, the teacher would not be permitted, under FERPA, to collect student true-false tests (at which point the tests would be maintained by the District) and distribute each test for correction to a student other than the student who completed the test. In this instance, the teacher would be disclosing each student's test or education record to a third party without prior written parental consent. Based on the information in Ms. Storaasli's response, it appears that the "chapter tests" may have been collected by Ms. ____ (thus maintained by the District) and each test later distributed for correction to a student other than the student who completed

the test. If this is the case, the District should ensure that all school officials are aware that such a practice would not be permitted under FERPA and should be discontinued.

For your information, there is a slight variation on the above procedure for correcting tests and providing a classroom learning exercise that would not be in violation of FERPA. Prior to collecting the tests, the teacher could direct the students to exchange tests with each other for the purpose of correcting the tests. After the tests are corrected and the classroom learning exercise completed, the teacher could then collect the tests for grading. Not until the tests were collected (thus, maintained by the District) would they be education records subject to FERPA.

In her March 19 response, Ms. Storaasli states:

> . . . Even assuming the uncorrected spelling pre-tests or portions of chapter tests are educational data under FERPA, which is disputed, FERPA creates an exception for certain information held by teachers.

Ms. Storaasli cites FERPA's sole possession records exception to the definition of education records and continues:

> . . . the spelling pre-tests and portion of chapter tests which are components of the student's grade, which are not revealed by the teacher to any other individual except a substitute teacher, are not educational data. Thus, the test results before or after they are recorded in the teacher's records are not educational data under the meaning of the law. Therefore the in-class correcting process would not be a violation of FERPA. There is no allegation that Teacher ____ allowed students to see the tests of other students that had already been recorded in the grade book. . . .

As stated above, there are several types of records which are specifically excluded by FERPA from the definition of education records, including "sole possession records." Sole

possession records are records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not revealed to any other person except a temporary substitute for the maker of the record. 34 CFR § 99.3 "Education records." This exemption generally refers to informal notes or "memory joggers" made by a teacher or other school official about a student. A student's completed test paper would not meet the definition of a sole possession record in that it would include information provided by the student, i.e., the student participated in the creation of the record. Also, as with education records, FERPA protects the privacy interests of parents and students with regard to personally identifiable information contained in sole possession records. Thus, as with education records, personally identifiable information contained in sole possession records may not be disclosed to third parties without prior written consent.

Thank you for your cooperation with regard to the resolution of this complaint. If you have any questions regarding our finding or technical assistance we have provided, you may contact Mr. Ricky Norment of my staff at 202-260-3887.

Sincerely,

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Ms. ____

Mr. Andrew Marko
Superintendent
Wyoming Valley West School district
450 North Maple Avenue
Kingston, Pennsylvania 18704

June 25, 1998

Dear Mr. Marko:

This is to advise you of the finding in the complaint filed with this Office against the Wyoming Valley West School District (District) by Mr. and Mrs. _____. Mr. and Mrs. _____ alleged that the District violated their rights under the Family Educational Rights and Privacy Act (FERPA) when it failed to provide them access to the education records of their son, _____, within 45 days of their request. Specifically, the _____ state:

> When we asked to review the teacher grade book to determine what assignments were incomplete, we were told by Mr. _____ that we could not see this information. We then requested a meeting with the school principal, Mr. Timothy McGinley, to ask for access to this information. We were told by Mr. McGinley that teacher grade books are private and we had no right to review them. . . . [Mr. Marko] denied our request for access to the assessment information. . . .

By letter dated August 11, 1997, you were informed of Mr. and Mrs. _____'s complaint and asked to provide a written response. You responded by letter dated September 4, 1997. In your response, you state in relevant part:

> As you indicate in your letter of August 14, 1997, Mr. and Mrs. _____ indicated in the complaint that Mr. _____ . . . indicated to them that they could not see the grade books. . . .

> Mr. McGinley upon meeting with Mr. and Mrs. _____ informed them that a teacher's grade book is considered a "sole possession record". . . .
>
> A meeting was in response to Attorney Michael Bradey's request for records was convened in my office on February 25 19[9]7 . . . The _____ indicated a wish to see the grade books from the 1995-96 school year at the meeting and were informed that these are sole possession records and in all likelihood would have been destroyed by the teachers at this point in time. . . .

Under FERPA, a school must provide a parent with access to his or her child's education records within 45 days of the receipt of a request. 20 U.S.C. § 1232g(a)(1)(A) and (B); 34 CFR § 99.10. The term "education records" is defined as those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution. 34 CFR § 99.3 "Education records."

Exempt from the definition of education records under § 99.3 of the FERPA regulations are "sole possession records." Sole possession records are defined as records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except the temporary substitute of the maker of the record. FERPA's sole possession exception is strictly construed to mean "memory jogger" type of information. For example, the exception includes information that a school official uses as a personal reference tool and, thus, is generally maintained by the school official unbeknownst to other individuals. A teacher's grade book does not meet the sole possession record exception under FERPA. Thus, the District violated FERPA when it failed to provide Mr. and Mrs. _____ access to _____'s grades in the teacher grade books. The _____ will be

informed of our finding by copy of this letter. Please note that in a situation where a record, such as a grade book, contains information on more than one student, the parent requesting access may inspect, review, or be informed of only the specific information about his or her child.

In order for this Office to close the investigation of this complaint, please provide this Office with assurance that Mr. and Mrs. _____ have been provided an opportunity to inspect and review _____'s grades in the teacher grade books as requested. Also, please provide assurance that appropriate officials in the District, including Mr. _____ and Mr. McGinley have been apprised of FERPA as outlined in this letter of finding, including the distinction drawn between an education record and a sole possession record. Please provide us with the requested information within three weeks of your receipt of this letter.

Thank you for your continued cooperation with regard to the resolution of this complaint.

Sincerely,

Leroy S. Rooker
Director
Family Policy Compliance Office

REC'D TEAM 11

OCT 26 2001

UNSCANNED

(15)

Supreme Court, U.S.
FILED

OCT 12 2001

OFFICE OF THE CLERK

No. 00-1073

In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS, *et alia*,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* COUNCIL OF COUNSELING PSYCHOLOGY TRAINING PROGRAMS, *et alia*, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, prohibits an educational institution that receives federal funds from allowing its students to grade one another's tests or other work or to call out aloud their grades in class for the teacher to record in the grade book.

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STATEMENT OF CONSENT

Mr. Jerry Richardson, Counsel for Petitioner Owasso Public Schools, and Mr. Will K. Wright, Jr., Counsel for Respondent Kristja J. Falvo, have given their written consent to the filing of this *amicus* brief in support of the respondent. The original drafts of these written consents are being filed concurrently with this brief.[1]

INTEREST OF *AMICI CURIAE*

The Council of Counseling Psychology Training Programs ("CCPTP") is an association of 67 universities in the United States which train counseling psychologists at the doctoral level. Individual counseling psychologists are also eligible for non-voting membership.

"Counseling psychology is a broad-based applied specialty within the science of psychology. As psychologists, we are committed to the generation and application of psychological knowledge based on scientific views of the world. As counseling psychologists, we are engaged in the pursuit and application of psychological knowledge to promote optimal development of individuals, groups, and social systems; to provide remedies for psychological difficulties and problems of living; and to enhance individual learning and education."

---

[1] Neither counsel for the petitioner nor counsel for the respondent participated in the drafting of this brief. All monetary contributions to the preparation and submission of this brief were furnished by the *amici curiae*, its members, and their counsel.

"Counseling psychology training programs are developed from a scientist-practitioner model of education. At a core level this model prescribes the integration of science base with practice applications and the development of research that is relevant to practice." (A CCPTP Commitment to the Integration of Science and Practice, 1994; http://www.lehigh.edu/ccptp/.)

The interest of CCPTP and the individual friends of the Court in this case stem from their dedication to enhance individual learning and education. Counseling psychologists who work in the schools and who train school counselors know how important a supportive educational environment is. Educational practices that degrade and humiliate students undermine the efforts of counselors to build positive attitudes toward learning. Thus, CCPTP and the individuals supporting this brief are dedicated to creating school environments that give support and encouragement for all children to improve so they can lead constructive and satisfying lives.

STATEMENT OF FACTS

Amici defer to the parties for a description of the full factual history of the case.

SUMMARY OF THE ARGUMENT

Amici are asking the Court to uphold the FERPA requirement that education records shall not be revealed without parental consent. A school grading practice in

which students score each others' tests and require students to call out those scores so teachers can write them in the grade book is clearly in violation of FERPA unless parental consent is given. The issue is important, however, not merely because it is illegal. It is important because of the ways in which teachers would be allowed to treat children in the absence of this law.

The Owasso grading practice is harmful to children. It subjects them to an atmosphere of ridicule, humiliation, and rejection. The vast majority of teachers do not use this harmful practice, but the minority who do use it are taking unnecessary risks with the welfare of children. Rejected children are the ones motivated to commit acts of school violence.

If there were some overriding educational benefit for the grading practice, maybe the risks to children would be justified. However, the arguments presented in favor of the practice state only that it provides repetition, immediate feedback and greater teacher efficiency. Repetition of correct answers by the teacher does not require peer grading. Immediate feedback to learners is desirable but can be accomplished much more efficiently by providing it directly to each learner, not through intervention by another student. Teacher efficiency and performance are actually diminished by the practice because valuable class time is spent in recording scores instead of learning new material. Besides, it is neither desirable nor necessary for every student paper to be graded.

Arguments that peer grading is some type of long-standing and honored educational practice are nonsense. There is no evidence in the educational literature that the

peer grading described here even takes place in the public schools, let alone that it could have some beneficial consequences.

Fears have been expressed that a ruling in favor of children and parents would do great harm to many traditional educational practices. These fears are groundless. A clear ruling in this case would not affect cooperative learning, peer editing, Socratic questioning, classroom discussions, corrective feedback, chalkboard problem solving, bulletin board displays, honor societies or selection of valedictorians. The case has to do with disclosing specific information that appears in education records about individual students without parental consent. Parents may well give their consent – in which case there is no legal problem. However, parents who do not want their children exposed to this potentially aversive environment should have the option allowed by FERPA.

Finally, we hear arguments about the definition of an "education record." Clearly the teacher's grade book is an education record, not a private diary. Grade books are collected and preserved at the end of each academic year by school districts, and their contents are routinely revealed to other educational professionals during meetings devoted to helping individual children succeed. Unauthorized disclosure of information entered in the grade book needs to be prevented regardless of the exact timing of the entry.

ARGUMENT

I. The psychological welfare of children is harmed by the peer grading practice.

It is important to be specific about the events that triggered this case initially. The peer grading practice at issue included the following steps:

1. The teacher administered a test;
2. After students completed the test, the teacher asked students to exchange papers;
3. The teacher read the correct answers out loud and asked students to score their neighbors' papers in accordance with the teacher's scoring key;
4. The scored papers were then handed back to the original owners;
5. The teacher asked each student to call aloud his or her score;
6. Students who refused to call out their scores were invited to go to the front of the classroom and whisper their scores to the teacher;
7. The teacher wrote the announced score for each child in the grade book.

This peer grading practice violated FERPA twice: (1) When the child scoring the test determined another child's score to be entered in the grade book, and (2) When the whole class learned the score as it was called out to be entered in the grade book.

Contrary to media reports that describe this issue as "paper swapping" and beneath the dignity of the

Supreme Court to address, the issue before us involves not only the legal right to confidentiality as protected by FERPA but also the serious consequences which result when that confidentiality is violated in the school environment.

A. Children are highly concerned about their school grades. Two studies document the importance with which teenagers regard the grades they get in school. The first study was reported in *USA Today* on August 26, 1999, under the headline: "Poll: Teen's Greatest Pressure is Grades." Then Secretary of Education Richard Riley released findings of the poll that was conducted by Peter Hart Research Associates. The survey asked 1,015 teenagers across America to list the one or two of the greatest pressures they face. The largest group, 44%, cited pressure to get good grades as their greatest pressure. Details can be obtained at the following website: http://www.countonshell.com/products/poll/poll-___teens___fs.html.

The second poll was conducted more recently by the same research firm and summarized in an article by Alan Elsner syndicated by Reuters and published in the *Detroit Free Press* on August 8, 2001:

"American high school students feel much more pressure to get good grades and go to college than to look cool, do drugs or have sex, according to a report issued Tuesday."

"The report by the Virginia-based Horatio Alger Association of Distinguished Americans was based on a

poll of 1,014 high-school students across the nation conducted in May. Pollster Peter Hart said it presented a largely upbeat picture about U.S. teens."

"Asked to rank pressures in their lives, 26 percent said the need to get good grades was a major problem; 36 percent called it a minor problem. That was higher than the 16 percent who said pressure to look a certain way was a major problem. About 15 percent cited finances as a major problem; 14 percent had a major problem getting along with their parents; 12 percent cited pressure to do drugs or drink alcohol; 10 percent spoke of pressure to have sex, and 9 percent listed loneliness and a feeling of being left out."

B. If their grades are too low, or too high, children get teased and taunted. Publicly disclosing test scores and grades to other students subjects students to ridicule and humiliation by their peers. One of the factors identified by psychological research as contributing to child victimization by bullying is that the child is " . . . slow in learning things;" (Rigby, 2001). Peer pressure to conform is especially intense in the preteen and teenage years. Any child deviating from the norm is subjected to name-calling, teasing and bullying. It is not only low-scoring students who are humiliated by labels such as "dummy." High-scoring children are also ridiculed with labels such as "geek," "nerd," "teacher's pet," or even cruder designations.

In this particular case, one of the Findings of Fact is that ridicule was experienced as a result of this grading practice: "5. As a result of the practice, plaintiff children have experienced ridicule (Philip), incorrect grading

(Elizabeth), and been asked to change grades of fellow students (Erica)." (United States District Judge Terry C. Kern, United States District Court for the Northern District of Oklahoma, No. 98-C-765-K.)

In her excellent book on motivation, Stipek (1998) evaluated the research evidence with this summary:

"**Minimize public evaluations**. Wall charts and other public displays of students' performance may enhance the motivation of a very small group of top performers, but they can threaten and discourage other students, especially if evaluative criteria are uniform despite varying skill levels among students . . . these public displays orient attention to relative performance rather than personal improvement or mastery" (p. 100).

Test scores are a particularly egregious source of humiliation because of their very nature – the evaluative criteria are uniform despite varying student skill levels. On every test in every classroom fully 50% of the students will score below average every time. By definition the arithmetic average in a normal distribution is the midpoint. Unlike the children of Lake Woebegone, elsewhere in the world it is impossible for all children to be above average. Usually it is the same children who score below average on test after test. Publicly disclosing the exact amount that they deviate from the average does irreparable harm to their self-esteem, peer relationships and motivation to succeed. We have abundant evidence that low-scoring students are far more likely to get arrested and to get into serious trouble with the law (Arum, 1999; Gottfredson, 1981; Gottfredson, 1988; Jensen, 1975; Loeber & Dishion, 1983).

C. Repeatedly allowing their grades to be known by peers exposes them to increased levels of humiliation. If the disclosure of education records were a one-time occurrence, it might be forgivable. But when repeated day after day and month after month, a policy of allowing teachers to require students to grade other students' papers and to have the grades called out loud for all to hear provides grist for the teasers and bullies to isolate and alienate certain students. Citing the work of Hoover & Hazler (1991), Kochenderfer & Ladd (1996a, 1996b), and Slee (1994), Ladd and Ladd (2001) point out that " . . . frequent harassment may lead children to develop a sense of mistrust toward their peer group at large and thus become so preoccupied with feelings of social alienation and concerns for their safety that they have difficulty attending to the demands of school and eventually develop negative school attitudes" (p. 27).

D. Acts of school violence tend to be committed by students who have been repeatedly harassed by peers. The peer grading practice is not only illegal, it is also a potential contributor to school violence. We already know that almost all the perpetrators of recent school shooting tragedies had been victims of teasing and bullying and had been alienated and isolated from their peers (Leary, Kowalski, Smith, & Phillips, 2001). Many young men who commit acts of violence feel rejected (Garbarino, 1999; Walsh, Beyer, & Petee, 1987).

The evidence is not only correlational. In a well designed series of experiments, Twenge, Baumeister and Tice (in press) found that participants who had been socially excluded evidenced significantly more aggressive behavior toward others than those not excluded.

In his excellent analysis of the Columbine disaster, Social Psychologist Elliot Aronson (2000) points out that the nature of the social situation in which youngsters are embedded is a powerful cause of deviant behavior: " . . . the perpetrators were reacting in an extreme and pathological manner to a general atmosphere of exclusion. This is a school atmosphere that most of the student body finds unpleasant, distasteful, difficult and even humiliating. If this is the case, then instituting a significant change in the social atmosphere of the classroom might succeed in making the school a safer place (reducing the possibility that students will become so disgruntled that they go over the edge and commit acts of extreme violence). This might also succeed in producing the kind of social environment that will make the school a more pleasant, more stimulating, more compassionate, and more humane place for all the students" (pp. 13-14).

Aronson goes on to say, "From my classroom research, I have found that the social atmosphere in most schools is competitive, cliquish, and exclusionary. The majority of teenagers I have interviewed agonize over the fact that there is a general atmosphere of taunting and rejection among their peers that makes the high school experience an unpleasant one. For many, it is worse than unpleasant – they describe it as a living hell, where they are in the out-group and feel insecure, unpopular, put-down, and picked on" (p. 15).

His principal solution to the problem involves creating cooperative, not competitive, classroom environments and cites abundant evidence that such cooperative atmospheres produce more harmonious working conditions

with no diminution in academic accomplishment. Preventing teachers from publicizing student grades will not solve all the problems, but it will minimize the salience of individual differences.

It is of interest to note that Columbine High School now requires parental consent for peer grading. The letter to parents explains, "This grading practice could include marking answers right or wrong and placing the appropriate number, percentage, or letter grade on the work of other students. In order to continue this practice, written consent from parents of students younger than 18, or students 18 and over is now required."

If parents are willing to allow their children to be treated in this way, the grading practice would be legal. Parents who object to the practice, however, should not be required to subject their children to such a potentially harmful environment.

II. The peer grading practice has no educational benefits and merely uses children as unpaid clerical assistants.

The only benefits claimed for the practice are (a) repetition of a basic skill, (b) immediate feedback, and (c) allowing teachers to be more efficient and productive. (Oklahoma Education Association *Amicus Curiae* brief, pp. 4-5.) Let's examine each claim.

A. Repetition does not require peer grading. The repetition presumably occurs because the teacher reads out the correct answers which had been taught previously. The children may hear the correct answers twice,

but they do not have an opportunity to practice the skill twice. Repetition is useful in learning a new skill primarily when the learners are doing the repetition, not when the teacher is repeating old information. If the teacher needs to repeat information, it need not necessarily be done during peer grading.

B. Immediate feedback to students can be achieved without publicizing their grades. Certainly immediate feedback is desirable, but there are other ways of providing it that do not violate confidentiality:

> **1. Students can score their own papers as teachers read the correct answers.** There is no need for students to exchange papers. In fact, scoring someone else's paper delays feedback and focuses attention on someone else's understanding, not on one's own. Some would argue that students might cheat if they score their own tests. It is also true that students might cheat in scoring others' tests – conspiring to be lenient in scoring a friend's paper but harsh in scoring the paper of someone in the out-group. A Finding of Fact by Judge Kern cited above indicates that Erica had been asked to change the grades of fellow students. If the purpose of a test is to provide immediate feedback, certainly the best way is to provide it directly to the test taker.
>
> **2. Students can look up the correct answers in keys provided by the teacher or textbook.** Many textbooks provide problems with the correct answers in the appendix. The educational goal is to learn how to solve the problems, not merely to write down the correct answers. Alternatively, teachers could photocopy their scoring keys and ask students to score their own tests either in class or as homework assignments.

> **3. Students can use computers for certain types of learning tasks.** Computers can provide exercises in mathematical understanding, language usage and other subject matters and provide instantaneous feedback to students. A large number of computer programs are available for this very purpose.
>
> **4. Student papers could be coded to disguise ownership.** If teachers insisted on using students as unpaid clerical assistants, privacy could still be partially protected by assigning a numerical code in place of each student's name.

C. Peer grading wastes valuable classroom time. Teachers who use students to score tests and require students to call out their scores justify the practice as saving teacher time – ignoring the fact that it is actually wasting student time. The practice does not make teachers more productive – it makes them less productive. Valuable classroom time is consumed by students calling out their test scores or walking to the front of the room to whisper in the teacher's ear while the teacher is writing the scores in the grade book. Learning the test scores of peers may occur, but such learning has never been advocated as an important educational objective. There are much better ways for teachers and students to be spending their time.

Every task and homework assignment need not be graded. The essential learning occurs when the child is actively engaged in a relevant task. Getting a grade may make the child feel either good or bad, but it adds little to the intended learning.

III. Past policies do not justify a harmful practice.

Advocates of the petitioners refer to the impact of the United States Court of Appeals for the Tenth Circuit ruling as dramatically altering " . . . long-standing customs and practices which comprise the day-to-day operation of our public school systems." (Brief of the Oklahoma Education Association as *Amicus Curiae* in support of Petitioners, p. 3.)

A. Peer grading has not been recognized or validated as a legitimate educational practice. Despite all the claims in the *amicus* briefs supporting petitioners that peer grading is a common longstanding practice, there is scarce evidence in the educational literature that it even exists.

1. No description of the Owasso peer grading practice appears in the educational literature. A computer search of ERIC, the educational research database sponsored by the U.S. Department of Education, reveals only three mentions of peer grading in the half-million educational articles and research studies published from 1966 to the present. None of the three describe the practice used in the Owasso School District. One reports that in a British institution of higher education there was a positive correlation between peer grading and teacher grading (Fry, 1990). The second report mentions that peer grading was used in training teachers of English as a Second Language (Ney, 1990). The third was a conference presentation in which peer grading was mentioned as one of three possible arrangements for individual skill evaluations in a general education class (Bauwens & Hourcade, 1997). Other descriptors were also used in an

attempt to locate relevant references: confidentiality, tests, scoring, student scoring, peer scoring, quiz, peer evaluation and classroom techniques. No professional educational literature could be found that described peer graded scores being entered into teachers' grade books. None mentions the calling out of scores. If the Owasso practice is "long standing," no one has bothered to write about it in the last 35 years, let alone evaluate it.

In an unpublished study by Friedman and Truog (2001), teachers and students in Wisconsin were surveyed about school grading practices. Among the 399 middle school teachers, 22% reported having had students exchange papers and score each other's work (not specifying whether the scores were entered in the grade book), and 10% have had students read their scores or grades aloud so the teacher can write them in the grade book. Among 501 high school teachers, the percentages were 16 and 3, respectively. Among the 852 students who say that "most teachers do this," the percentages were 53 and 23, respectively, but no breakdown is provided on the exact number of teachers nor the frequency of each practice. The Owasso peer grading practice combined peer grading with the calling out of scores, a combination not specifically itemized in this study, but the percentages would have to be less than for either practice alone. If the results of this study can be generalized, it is clear that a small minority of Wisconsin teachers resorted to engaging in the Owasso peer grading practice.

2. Educational measurement textbooks make no mention of peer grading. A survey of seven

recent textbooks on educational assessment revealed that none of them mentioned peer grading and none advocated the use of students to score educational assessments in class (Blythe, T., Allen, D., & Powell, B. S. (1999); Brandt, R. (Ed.) (1998); Fenner, D. E. W. (1999); McMillan, J. H. (2000); Ory, J. C., & Ryan, K. E. (1993); Speck, B. W. (2000); Strickland, K., & Strickland, J. (1998)). Only Speck (2000) mentioned peer evaluation at the college level to teach critical writing skills.

B. No matter how long a practice has been in use, it still can be discovered to be harmful. School segregation was practiced for decades before the Supreme Court ruled that schools could not be both separate and equal. Some teachers may have used the peer grading for a long time, but most teachers reject the practice as harmful to students and as a waste of class time. The absence of the practice from professional educational literature hints that those who do use the practice are not particularly proud of it.

IV. Educators will be aided, not confused, by a clear ruling in this case.

Some worry that, if students cannot score each others' tests and call out grades, teachers will not be able to engage in cooperative learning assignments, that oral recitation will be prohibited, that the Socratic method of questioning cannot be used, and that awards for academic excellence will be forbidden. None of these educational practices is the subject of this case.

A. Cooperative learning and peer editing are completely different from peer grading. Cooperative learning puts students into teams whose members work together to solve some problem or create some product. Each member of the team may contribute in a different but useful way. The children help each other to succeed because the criterion is the team's success, not the success of any individual on the team. Children within the team do evaluate the ideas and contributions of their peers, but they do so on the basis of the extent to which the ideas help to achieve the team's goal.

Cooperative learning differs from peer grading in the following ways:

1. With peer grading students simply follow the teacher's directions to mark an answer right or wrong. In cooperative learning students form their own evaluative judgments on the basis of the contribution to team success.

2. In cooperative learning the judgments that children make about their peers' contributions do not get entered into the teacher's grade book and thus do not become part of the "education record."

Peer editing is used in many schools to help students acquire critical skills in evaluation and editing. Peers provide suggestions and comments on each other's written work and then discuss the comments. The student author can choose to incorporate these suggestions or not in preparing a subsequent draft. Only the final draft is graded and that grading is done by the teacher.

B. Socratic questioning, chalkboard problem solving, classroom discussions, and posting student work on the bulletin board do not violate privacy as defined by FERPA. Naturally teachers want to help their students improve. Correcting errors is one part of the job. Teachers may make judgments about the quality of student achievement based on classroom performance and give feedback in front of the whole class about ways to improve. They may summarize their judgments by entering a letter grade or numerical score into their grade books. They may inform each student privately about that grade or score. FERPA is violated only if the teacher, without parental consent, shares the grade book information about one child with someone not eligible to receive it.

C. Honor society membership and valedictorian status do not violate FERPA. Admission to honor societies and other academic honors are based on averages summed over many courses. Those honored are not identified by a specific test score entered in a teacher's grade book. Students not achieving high academic honors are not individually identified.

D. The only practice that is at issue here is the practice of revealing to peers student test scores that are entered in the teacher's grade book. There is no issue about students working together, forming their own judgments about the contributions of their peers, or providing their own feedback to fellow students. There is no issue about award assemblies or the choice of a valedictorian where the awards are based on a summation of grades. There is no issue about students voluntarily sharing their test scores with each other. However, when teachers turn

the scoring of teacher-made tests over to students to score their neighbor's paper in accordance with the teacher-provided scoring key or require students to call out their scores, they are clearly in violation of FERPA which provides that individual education records remain confidential unless parental consent is given.

The Owasso School District refused to modify their support of peer grading when asked to do so by Ms. Falvo, thereby indicating that they did indeed have a policy, implicit or explicit, endorsing what they term a common practice. Owens, Slee, and Shute (2001) advocate a change in the system: "Instead of focusing on changing the 'bad' behavior of the harasser and 'helping' the victim, consideration may be given to roles, relationships, interactions, and communications within the system that encourage or discourage harassment" (p. 235). Teachers control these relationships by the way they structure classroom tasks (Rosenholtz & Simpson, 1984). When all students are doing the same thing at the same time (unidimensional classrooms), greater social comparison behavior results as Pepitone (1972) demonstrated experimentally. The Owasso peer grading system is the epitome of a unidimensional classroom and maximizes social comparisons among peers.

The systemic solution in this case is simple enough: if school districts want to support peer grading of the type practiced in the Owasso School District, they must first obtain the permission of the parents involved. They would then be in compliance with FERPA.

V. The information itself must be protected, not merely the physical material on which the information is recorded.

The whole purpose of FERPA is to preserve the confidentiality of the information, not to protect the pencil marks on paper or other physical manifestations of the records. If the records were encrypted so that no outsider could decipher them, they could be displayed on a billboard in Times Square with no objection. However, if the records were recorded as magnetic impulses on a hard disk and those records could be accessed and interpreted by a computer hacker, confidentiality is clearly violated even though no physical material changed hands. The intent of the law is clearly to protect the information about individual students unless parents consent to its release.

VI. Publicizing information entered in the teacher's grade book violates the law regardless of the exact timing of the entry.

Some would maintain that at the instant a score is called out it is not yet an education record because the teacher waits a split-second before writing it down in the grade book. Such hair-splitting is nonsense because the information about individual student achievement that appears in the grade book has been disseminated without parental consent. If the teacher first wrote down the grade and then called it out loud, the effect would be just as harmful as if the sequence were reversed.

VII. The grade book is clearly an "education record."

Some argue that the grade book does not qualify as an education record under FERPA. FERPA defines education records as " . . . those records, files, documents, and other materials which –

(i) contain information directly related to a student; and

(ii) are maintained by an education agency or institution or by a person acting for such agency or institution."

Clearly the teacher is acting for an education agency, and the grade book contains information about each student in the teacher's classes. However, FERPA goes on to exclude private documents. It states, "The term 'education records' does not include –

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;"

The grade book is not a private document – its contents are revealed to other educational personnel on a regular basis.

Many school districts require that teacher grade books be turned in to the central office at the end of each academic year where they are maintained permanently.

Information from teacher grade books is also routinely shared in three types of educational meetings:

(1) Individual Educational Plans (IEP). The purpose of IEP meetings is to assess the placement of and the educational program for students eligible for special education. Attendees may include all the child's teachers, the counselor, members of the special education staff, a psychologist, a school administrator as well as the parents and the child. Teachers may share grade books, or excerpts thereof, with members of the planning group in an effort to develop the best possible educational environment for the child.

(2) Student Study Teams (SST). The SST meetings are designed to explore the strengths and weaknesses of students who may be having learning difficulties and to design interventions to help children be successful in school. Attendees may include all those listed for IEP meetings plus outside tutors. Again grade book records are shared.

(3) 504 Meetings. The 504 meetings are designed to make accommodations for children with various types of disabilities. Children may be diagnosed as ADD or ADHD and may need extra time to complete tests. Some may require electronic aids or other accomodations. All the child's teachers are expected to implement the plan that is developed so their input is essential. Grade book records are frequently cited as evidence for what a child can and cannot do.

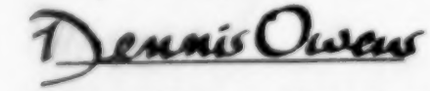
It is obvious that teacher grade books must be included as "education records" because they are not maintained in the sole possession of the maker and they

are revealed to other educational personnel in addition to substitutes.

CONCLUSION

Amici respectfully urge the Court to continue allowing parents the option of disclosing or not disclosing their children's education records as FERPA provides.

Respectfully submitted,



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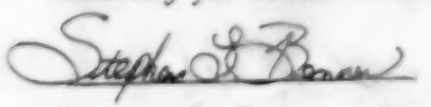

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